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Supreme Court of the United States

OCTOBER TERM, 1957

No. 662

HOTEL EMPLOYEES LOCAL NO. 255, HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION, ET AL., PETITIONERS,

vs.

BOYD LEEDOM, INDIVIDUALLY AND AS CHAIRMAN, NATIONAL LABOR RELATIONS BOARD, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 13, 1957
CERTIORARI GRANTED MARCH 3, 1958

SUPREME COURT OF THE UNITED STATES

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IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,765

HOTEL EMPLOYEES LOCAL NO. 255, HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION,

and

HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION, A.F.L.-C.I.O., Appellants,

v.

BOYD LEEDOM, individually and as Chairman, NATIONAL LABOR RELATIONS BOARD, et al., Appellees.

Appeal from the United States District Court for the District of Columbia

---

JOINT APPENDIX

[fol. 1]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil No. 134-'56

HOTEL EMPLOYEES LOCAL NO. 255, HOTEL & RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION, 1575 Washington Avenue, Miami Beach, Florida,

and

HOTEL & RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION, A.F.L.-C.I.O., 525 Walnut Street, Cincinnati, Ohio, Plaintiffs,

v.

BOYD LEEDOM, individually and as Chairman of the National Labor Relations Board, and ABE MURDOCK, IVAR PETERSON, PHILIP RAY ROGERS and STEPHEN SIBLEY BEAN, individually and as members of the National Labor Relations Board, Federal Security Building, South, 4th and Independence Avenue, SW, Washington 25, D. C., Defendants.

COMPLAINT—Filed January 12, 1956

The Plaintiffs, for their claim for relief against the defendants, allege as follows:

1. The jurisdiction of this court is invoked under: the Constitution of the United States and particularly Article I, Section 8 thereof and Amendment V Thereto; the Labor Management Relations Act, 1947, as amended, 29 U.S.C. Section 141, et seq., the Administrative Procedures Act, 5 U.S.C. Section 1001, et seq., the Federal Declaratory

Judgment Act, 28 U.S.C. Section 2201, et seq.; and 28 U.S.C. Section 1331.

[fol. 2] 2. There is a real and actual controversy between the parties and said controversy, exclusive of interest and costs, exceeds $3,000.00.

3. Plaintiff Hotel Employees Union Local 255, hereinafter referred to as "Local 255," is a voluntary unincorporated association with its principal office located at 1575 Washington Avenue, Miami Beach, Florida. Said Local 255 is a labor organization within the meaning of the Labor Management Relations Act, 1947 (hereinafter referred to as the "Act") and represents employees in an industry affecting commerce, as defined by said Act.

4. Plaintiff Hotel & Restaurant Employees and Bartenders International Union, with its principal offices at 525 Walnut Street, Cincinnati, Ohio, is an unincorporated association and labor organization within the meaning of the Act and is composed of affiliated local labor organizations including plaintiff Local 255 and the members thereof. Said International Union represents employees throughout the United States in industries affecting commerce and particularly in the hotel industry.

5. The plaintiffs sue in their own behalf and on behalf of employees whom they represent.

6. The National Labor Relations Board is an agency of the United States; the defendant Boyd Leedom as the Chairman, and the defendants Abe Murdock, Ivar Peterson, Philip Ray Rodgers and Stephen Sibley Bean as members thereof, pursuant to Title I, Section 3 of the Act, constitute and comprise said Board. The defendants are sued individually and as Chairman and members, respectively, of said Board and are hereinafter referred to collectively as "Board".

7. The principal office and place of business of the Board is in the District of Columbia pursuant to Title I, Section 5 of said Act.

8. The Miami Beach Hotel Association, hereinafter referred to as "Association", is a trade association having

a membership of more than 150 hotels in the Miami Beach, Florida area. At all times material herein, said Association and the individual members thereof have been engaged in interstate commerce; their operations individually affect commerce; and a labor dispute with said Association or the individual members thereof or any of them would [fol. 3] tend to burden and obstruct commerce and the free flow of commerce, all within the meaning of said Act.

9. The individual hotel members of said Association and said Association are "employers" within the meaning of said Act.

10. The Act provides, inter alia, as follows, under Section 9 (c) thereof:

> "(c)(1) Whenever a petition shall have been filed in accordance with such regulations as may be prescribed by the Board—
>
> (A) by an employee or a group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employers decline to recognize their representative as the representative defined in Section 9 (a) . . .
>
> the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists and provide for an appropriate hearing upon due notice . . . If the Board finds upon the record of such hearing that such a question of representation exists it shall direct an election by secret ballot and shall certify the results thereof."

11. On or about the 29th day of June, 1955, plaintiff Local 255, on behalf of a group of employees of the aforementioned employers filed a petition for representation with the Tenth Regional Office of said Board, all in accordance with the provisions of said Act and the regulations prescribed by said Board. Said Regional Office captioned

said petition "All Hotel Members of Miami Beach Hotel Association," Case No. 10-RC-3135.

12. Immediately thereafter, on the 30th day of June, 1955, the Regional Director of said Region, as agent for said Board, advised Local 255, inter alia, as follows:

> ". . . You are hereby advised that absent the receipt of a withdrawal request before the close of business tomorrow July 1, 1955 the petition for certification of representatives will be dismissed."

[fol. 4] 13. Said petition was not withdrawn and, on the 1st day of July, 1955, the aforementioned Regional Director, as agent of said Board, advised Local 255, inter alia, as follows:

> "It does not appear that further proceedings are warranted inasmuch as it would not effectuate the policies of the Act to assert jurisdiction in this case. Accordingly the petition is dismissed."

14. Thereafter, on or about the 13th day of July, 1955, in accordance with the rules and regulations of said Board, the plaintiffs did file a Request for Review of the aforementioned decision of the Regional Director. On or about the 26th day of August, 1955, the said Board did issue a Decision and Order in part as follows:

> "Re All Hotel Members of Miami Beach Hotel Assoc., Case 10-RC-3135, the Board has carefully considered the appeal filed in this case and decided to sustain the Regional Director's dismissal of the petition on the ground that it would not effectuate the policies of the Act to assert jurisdiction over hotels. Accordingly, the petition is dismissed."

15. Thereafter, on or about the 9th day of September, 1955, plaintiffs did file with the defendant Board a Request for Reconsideration of the aforementioned Decision and Order of August 26, 1955, and on the 10th day of October, 1955, said Board did overrule said request.

16. At all times since the filing of the aforementioned petition a question of representation affecting commerce within the meaning of the Act has existed and continues to exist in regard to the employer members of the said Association.

17. On or about the 7th day of July, 1955, in accordance with the rules and regulations of said Board, Local 255 did file with the aforementioned Regional Director of the Tenth Region a charge alleging the commission of certain unfair labor practices by the aforementioned employers within the meaning of Section 8(a)(1)(3) and (5) of said Act. On or about the 30th day of August, 1955, the Regional Director of said Region, on behalf of the General Counsel, refused to assert jurisdiction over said Associa- [fol. 5] tion and the individual members thereof and therefore refused to investigate or issue a complaint on said charges.

18. On or about the 8th day of September, 1955, in accordance with the rules and regulations of the Board, Local 255 did file with the General Counsel of said Board a Request for Review of the aforementioned action of the Regional Director.

19. On or about the 14th day of October, 1955, the General Counsel advised the plaintiffs, inter alia, as follows:

> "The General Counsel sustains the ruling of the Regional Director. The General Counsel concludes that in view of the Board's recent decision in *All Hotel Members of Miami Beach Hotel Association*, et al., Case No. 10-RC-3135, reaffirming its jurisdictional policies with regard to the hotel industry, further proceedings herein are not warranted."

20. Plaintiffs have by the foregoing acts exhausted their administrative remedies, and there is no adequate or existent proceeding for judicial review of the aforementioned Decision and Order.

21. The aforementioned Decision and Order of the Board dated August 26, 1955, in withholding agency action is

illegal and void in that it deprives plaintiffs and their members of their rights without due process of law, equal protection of the Labor Management Relations Act, 1947 applicable to all persons similarly situated, and discriminates against plaintiff labor organizations and the members thereof employed in the hotel industry, all in violation of Amendment V of the Constitution of the United States.

22. At all times material herein the said Board has failed and refused to investigate the aforementioned petition filed on June 29, 1955; has failed and refused to provide for appropriate hearing on due notice; has failed and refused to direct an election by secret ballot; and has failed and refused to certify the results thereof, all contrary to and in violation of Section 9 (c) of said Act.)

23. The Decision and Order of the Board dated August 26, 1955, is illegal and void in that same was determined without investigation, hearing, or affording plaintiffs [fol. 6] opportunity to present evidence, all in violation of Amendment V of the Constitution of the United States.

24. The Decision and Order of the Board dated August 26, 1955, is illegal and void in that the arbitrary exclusion of the hotel industry from the operation of the Act is an unlawful and unconstitutional assumption of legislative power in violation of Article I, Section 8 of the Constitution of the United States.

25. The Decision and Order of the Board dated August 26, 1955, is illegal, void and in excess of statutory authority; in that, said Act does not grant the Board authority to dismiss proceedings under Section 9 (c) of the Act on the grounds set forth in said Order and the provisions of Section 9 (c) are mandatory upon said Board.

26. The Decision and Order of the Board dated August 26, 1955, is illegal and void in that said Order is contrary to and in violation of the provisions of Section 9 (c) of the Labor Management Relations Act as amended.

27. The Decision and Order of the Board dated August 26, 1955, is illegal and void in that said Decision and

Order constitute a "Rule" within the meaning of the Administrative Procedures Act, 5 U.S.C.A. 1001 (c) and was promulgated in violation of the requirements of said Act and particularly 5 U.S.C.A., 1003 et seq.

28. The Decision and Order of the Board dated August 26, 1955, is arbitrary and capricious and constitutes an abuse of the Board's discretion, if there is such discretion.

29. The Decision and Order of the Board dated August 26, 1955, is illegal and void in that it is not supported by any evidence.

30. If the Labor Management Relations Act, 1947 as amended, is so construed as to permit said Board to exclude the hotel industry from its operation on a policy basis without reference to the facts, then said Act is an unlawful delegation of legislative function and contrary to Article I, Section 8 and Amendment V of the Constitution of the United States.

31. The Decision and Order of the Board dated August 26, 1955, has deprived the plaintiffs and their members of their right to participate in elections and other pro- [fol. 7] ceedings before the National Labor Relations Board, to be certified as the collective bargaining representatives of employees of the employers herein and the employers in the hotel industry throughout the United States; and deprived them of their constitutional and statutory right to organize and represent employees in the hotel industry. Said Decision and Order of the Board has deprived employees represented by plaintiffs of the rights afforded to them under the Labor Management Relations Act, 1947, to associate together and to organize and bargain collectively through representatives of their own choosing, and has deprived said employees of the protection of the said Act in exercising said rights. Unless restrained by this court, defendants will continue to deprive plaintiffs and their members of said rights.

32. Substantial and irreparable injuries to plaintiffs' rights and the rights of plaintiffs' members will result unless the relief requested by plaintiffs is granted.

Wherefore, plaintiffs pray:

1. That a declaratory judgment be granted by this court declaring that the Decision and Order of the National Labor Relations Board dated August 26, 1955, dismissing the petition in the case captioned "All Hotel Members of Miami Beach Hotel Association, No. 10-RC-3135", in unconstitutional, unlawful, arbitrary, capricious and/or an abuse of said Board's discretion, and that said Order be set aside and held for naught.

2. That a declaratory judgment be rendered by this court declaring that the National Labor Relations Board may not withhold its processes and the benefits of the Labor Management Relations Act, 1947, as amended, from the plaintiffs or any other labor organization or representative of employees on the sold (sic) ground that it does not effectuate the policies of the Act to assert jurisdiction over hotels."

3. That a permanent injunction be granted by this court ordering the defendants individually and as members of the National Labor Relations Board, their agents, servants, employees, representatives and all persons in concert or participation with them, to investigate the petition of plaintiff, Local 255, in the case captioned "All Hotel Mem-[fol. 8] bers of the Miami Beach Hotel Association, No. 10-RC-3135"; to provide for a hearing on due notice; to conduct an election; and to certify the results thereof.

4. That a permanent injunction be granted restraining and enjoining the defendants, their agents, servants, employees, representatives and attorneys and all persons acting in concert or participation with them or any of them from withholding the processes and facilities of the National Labor Relations Board and from dismissing the petition of the plaintiffs or any other labor organization on the sole grounds (sic) that it does not effectuate the policies of the Act to assert jurisdiction over hotels."

5. That this court issue an order temporarily restraining and enjoining the defendants in the manner as described in paragraphs 3 and 4.

6. That the court grant any further relief it deems just and proper in the premises.

/s/ J. W. Brown, /s/ Jonas B. Katz, Attorneys for Plaintiffs, 1505 Fountain Square Bldg., Cincinnati 2, Ohio, DUnbar 1-2121.

/s/ John E. McCarty, 736 Bowen Bldg., 815—15th Street, N.W., Washington, D. C.

IN UNITED STATES DISTRICT COURT

MOTION OF DEFENDANTS TO DISMISS THE COMPLAINT, OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT IN THEIR FAVOR —Filed March 12, 1956

Come now the defendants, by their attorneys, and, in opposition to plaintiffs' motion for a permanent injunction and declaratory judgment move:

1. That the complaint herein be dismissed because:

(a) This Court is without jurisdiction of the subject matter of this action.

[fol. 9] (b) The complaint fails to state a claim warranting judicial relief.

2. In the alternative, that summary judgment for defendants be granted, on the basis of the complaint and the affidavit of Frank M. Kleiler, Executive Secretary of the National Labor Relations Board, and Exhibit A, B and C annexed thereto, which documents are attached to and made a part of this motion.

Wherefore, it is respectfully requested that plaintiffs' motion for a permanent injunction and declaratory judgment be denied, and that the relief requested by the defendants be granted.

/s/ Marcel Mallet-Prevost, Assistant General Counsel.

Arnold Ordman, John E. Jay, National Labor Relations Board, Attorneys for Defendants.

Dated March 12, 1956.

AFFIDAVIT OF FRANK M. KLEILER IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS, OR FOR SUMMARY JUDGMENT

District of Columbia, ss.:

Frank M. Kleiler, being first duly sworn, deposes and says:

1. He is executive secretary of the National Labor Relations Board and is authorized by Section 102.87 of the Rules and Regulations of the Board, Series 6 (29 C.F.R. 102.87) to certify copies of all papers and documents which are a part of any of the files or records of the Board.

2. He has examined the files and records of the Board in the proceedings entitled, "All Hotel Members of Miami Beach Hotel Association," Case No. 10-RC-3135, and has personal knowledge of the facts set forth herein.

3. In the subject representation proceeding, Hotel Employees Union Local No. 255, Hotel and Restaurant Employees and Bartenders International Union, AFL, [fol. 10] hereinafter referred to as Local No. 255, filed a petition on June 29, 1955, seeking representation as exclusive bargaining representative for the employees employed by the hotel members of the Miami Beach Hotel Association, excluding all office and clerical employees, management employees, professional employees, and guards and supervisors as defined in the Act.

4. On July 1, 1955, after advising petitioner Local 255 of the Board's long standing policy not to exercise jurisdiction over the hotel industry in the States, referring to various prior decisions of the Board, and affording Local 255 an opportunity voluntarily to withdraw the petition, the Regional Director for the Tenth Region dismissed the petition. A copy of the Regional Director's dismissal of the petition is annexed hereto as Exhibit A.

5. Pursuant to the request of Local 255, dated July 12, 1955, for review of the Regional Director's action dismissing the petition, the Board granted Local 255 permission to present oral argument, and to file a brief, on August 9, 1955. Thereafter, the Miami Beach Hotel Association and the American Hotel Association were granted permission to participate in oral argument and file briefs. Oral

argument before the Board was had on August 9, 1955. Excerpts from the transcript of the hearing are annexed hereto as Exhibit B.

6. On August 26, 1955, the Board, with one member dissenting, issued its decision sustaining the action of the Regional Director in dismissing the complaint. A copy of the Board's minute is annexed hereto as Exhibit C.

7. On September 9, 1955, Local No. 255 filed a request for reconsideration which was denied by the Board on October 10, 1955, with one member dissenting.

8. On January 9, 1955, Local No. 255 filed a request for further reconsideration which was denied by the Board on January 27, 1956, with one member dissenting and another member not participating.

/s/ Frank M. Kleiler, Executive Secretary, National Labor Relations Board.

[fol. 11]

EXHIBIT A TO MOTION

NATIONAL LABOR RELATIONS BOARD
Tenth Region
Room 537, Peachtree-Seventh Building
50 Seventh Street, Northeast
Atlanta 5, Georgie

Tel. Elgin 3311

July 1, 1955

Registered Return
Receipt Requested

Hotel Employees Union Local No. 255
Hotel & Restaurant Employees and Bartenders
International Union
1575 Washington Avenue
Miami Beach, Florida

Attention: Mr. Jonas B. Katz

Re: All Hotel Members of Miami Beach Hotel Association Case No. 10-RC-3135

Gentlemen:

The above captioned case petitioning for an investigation and certification of representatives under Section 9

of the National Labor Relations Act, as amended, has been fully considered.

On October 26, 1954, the Board issued its Decision and Order in *The Virgin Isles Hotel, Inc.*, case (110 NLRB No. 65) supplementing its recently announced standards for the assertion of jurisdiction and reiterating its "long standing policy not to exercise jurisdiction over the hotel industry. Consequently, it does not appear that further proceedings are warranted inasmuch as it will not effectuate the policies of the Act to assert jurisdiction in this case. I am, therefore, dismissing the petition in this matter.

Pursuant to the National Labor Relations Board Rules and Regulations, you may obtain a review of this action by filing a request for such a review with the National Labor Relations Board, Washington, 25, D. C., a copy with me and a copy to all the interested parties. This request must contain a complete statement setting forth the facts and reasons upon which it is based. The request should be filed within ten (10) days from the date of receipt of this letter, except that the Board may, upon good [fol. 12] cause shown, grant special permission for a longer period within which to file.

Very truly yours,

/s/ John C. Getreu
Regional Director

cc: National Labor Relations Board
Washington, D. C.
Miami Beach Hotel Association
1 Lincoln Road
Miami Beach, Florida (with copy of petition attached)

J. W. Brown, Esquire
Attention Jonas B. Katz
1505 Fountain Square Building
Cincinnati 2, Ohio

All Concerns named in Petition as Members of The Association (with copy of Petition attached)

EXHIBIT B TO MOTION

NATIONAL LABOR RELATIONS BOARD

CASE NO. 10-RC-3135

In the matter of:

ALL HOTEL MEMBERS OF MIAMI BEACH HOTEL ASSOCIATION

and

HOTEL EMPLOYEES UNION LOCAL NO. 255, HOTEL & RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION, AFL, Petitioner.

Room 2030 Health, Education and
Welfare Building, South,
Washington, D. C.,
Tuesday, August 9, 1955.

Oral argument in the above entitled matter convened at 10:05 o'clock a.m.

BEFORE:

GUY FARMER, Chairman
ABE MURDOCK, Member
IVAR H. PETERSON, Member
[fol. 13] PHILIP RAY RODGERS, Member
BOYD LEEDOM, Member

* * * * * * *

Mr. Murdock: How does the situation you are now calling attention to differ in respect to what was involved when you argued the St. Louis case? It is the same law, isn't it?

Mr. Brown: The magnitude. The same law, the same sections and, I think, the same policy of the United States. But I hope a different policy on the part of the Board. The facts, however, are quite different. In the St. Louis case we had, first, as I said, a smaller situation, and you

must remember that the Board's decision was based upon the facts in the St. Louis case.

You will recall that the Board said, "We do not believe that a settled policy, endorsed by all those members of Congress who have reported an opinion on the subject" —and I think that was two— "should be lightly overturned by the action of the administrative board. And certainly no persuasive reasons have been presented to warrant overturning it in this case."

Mr. Murdock: That is the argument you made in the St. Louis case.

Mr. Brown: Yes. Apparently in the St. Louis case there weren't sufficient facts to overwhelm the Board, facts that would strike the conscience of a man and compelling action, that at least persuaded the majority of the Board. The Board was very careful to say in the St. Louis case, as were all the parties, that the Board does have jurisdiction. There was no argument on that point and there is none today, as I understand it. Even counsel— I myself, in arguing at that time opposing jurisdiction, made a specific argument to the effect that the Board does have jurisdiction.

Chairman Farmer: You mean over any and all hotels, regardless of the particular facts?

Mr. Brown: No. I said we were considering the St. Louis case. There was no question in my mind that the Board [fol. 14] had jurisdiction in the St. Louis case, nor was there any question in the mind of Mr. Brownell, who argued for the American Hotel Association at that time. He made the same argument, that the Board unquestionably had jurisdiction. I would like to read to you his statement at the time.

> "When you have legislative policy here and an administrative policy which has been unanimous for a period of 15 years, upon which the hotel industry has relied and when no question as to settling labor disputes in the hotel industry has ever risen, then I say that as a matter of administrative discretion you should not disturb that policy."

Then a more apt quotation in an exchange between Mr. Houston and Mr. Brownell at that time.

> "Mr. Houston: Let me ask you this: In the light of the quotations of Senator Taft and Senator Pepper, do you concede that we have discretion in the matter?
>
> "Mr. Brownell: Well, I think there is no question but that you have jurisdiction in the matter and I am appealing to your discretion."

So throughout the argument, all the parties were in unanimous accord that the Board does have jurisdiction in the hotel industry.

How could it be otherwise? We have an industry which is the seventh largest in the United States, which does seven and a half billion dollars worth of business, which involves more than a half million dollars in the principal hotels. I am not getting down to the rooming house level, but the large hotels in the general class that might be taken under your wing, under your jurisdiction.

Take, for example, the Florida figures. How big is the industry in Florida? Maybe this would be enlightening to the Board.

Mr. Murdock: Are you arguing now, Mr. Brown, that there has been such a change in the size of the hotel business that it warrants a different decision today than it did then?

Mr. Brown: No. There has been no change——

Mr. Murdock: Those figures were present in the St. [fol. 15] Louis case, except I would imagine a moderate growth since that time.

Mr. Brown: Those figures might have been present in the St. Louis case, but they were not argued. The situation hasn't changed radically with regard to the size of the industry, the ranking of the industry. It was probably seventh then, too, but we didn't argue those points to you, and no one else argued them to you. As a matter of fact, the St. Louis case was argued as the St. Louis case. There was a complete hearing below. There was evidence taken over a period of three weeks. There were serious questions of unit. There were other questions involved which you have every day. All those questions

were presented here. Then after that case was heard by this Board, the Board disregarded many of the technical questions and the case turned entirely on one of policy. The Board determined that it would not take jurisdiction in hotels because it hadn't done so previously.

Mr. Murdock: The change, then, that you are talking about when you talk about a change in facts, is largely the fact of the relationship between the employees and employers in the hotel industry. Today, as I understand it, there is a rather gigantic strike on in the Florida area. Is that the essential difference?

Mr. Brown: Yes, sir.

Mr. Murdock: Could that have been reasonably anticipated when the St. Louis case was argued?

Mr. Brown: Let me say to you, Mr. Murdock, it should have been reasonably anticipated by myself, by my clients, and unfortunately it was not. You have touched on something which is a little out of the order that I intended to present it, but since you asked the question——

Mr. Murdock: Don't let me disturb you on it.

Mr. Brown: Let me take the point and answer it since you have brought it up, rather than let the question hang there.

What is the situation today as contrasted with 1951 in the field of labor relations?

Prior to 1951, we had no difficulty getting along with hotelmen all over the United States. When I say "we," I [fol. 16] mean the Hotel & Restaurant Employees International Union. We had a sort of regularized procedure, informal but quite regular, and relatively peaceful. We had our strikes, our differences, as all organizations have; but generally speaking, if we had a majority of the people in the hotel, management sat down and negotiated with us. Generally speaking, management wouldn't fire people for union activity or for joining a union or for trying to organize one. So we had a relatively peaceful relationship.

But as soon as the 1951 case was announced, things changed overnight.

Mr. Murdock: How about the closed shop situation in the hotel industry at the time of the St. Louis case? Was it very prevalent, or did it exist at all?

Mr. Brown: No. We never and we still do not have a closed shop hardly anywhere. We have a union shop. So you see, that source of friction didn't exist.

EXHIBIT C TO MOTION

MINUTE OF BOARD ACTION

August 26, 1955

ALL HOTEL MEMBERS OF MIAMI BEACH HOTEL ASSOCIATION

Case No. 10-RC-3135

The Board determined to sustain the Regional Director's dismissal of the petition in the above-entitled case.

On June 29, 1955 the Petitioner (Hotel Employees Union Local No. 255, Hotel and Restaurant Employees and Bartenders International Union, AFL), filed its petition herein for all employees of the Employer and, on July 1, 1955 the Regional Director dismissed the petition on the ground that it would not effectuate the policies of the Act to assert jurisdiction. Thereafter, on July 12, 1955 the Petitioner filed a Request for Review of the Regional Director's action asserting the Board should reverse its policy and take jurisdiction over the hotel industry. On August 9, 1955 the Board heard oral argument in this matter.

[fol. 17] The Board has decided to adhere to the long-established policy of not asserting jurisdiction over the hotel industry, on the ground set forth in *St. Louis Hotel Association*, 92 NLRB 1388. Accordingly, the action of the Regional Director was warranted. Member Murdock dissents from the determination of the majority to adhere to a policy of not asserting jurisdiction over any hotels without regard to their impact on commerce, in accordance with his views expressed in detail in his dissent in the *St. Louis Hotel Association* case. Accordingly, he would overrule the Regional Director and direct that the case be sent to hearing and on the basis of a full record determine the impact of the operations of the Employers herein on commerce.

Chairman Farmer believes that the Board should give consideration after a hearing to modifying its policy so as to take jurisdiction on a limited basis pursuant to appropriate standards.

APPROVED:

Farmer
Murdock (dissents)
Peterson
Rodgers
Leedom

/s/ Frank M. Kleiler
Executive Secretary

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF JONAS B. KATZ IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS AND/OR FOR SUMMARY JUDGMENT—
Filed April 9, 1956

State of Ohio,
County of Hamilton, ss.:

Jonas B. Katz, being first duly sworn, deposes and states:

1. He is one of counsel for plaintiff Hotel Employees Local 255 and had cause to investigate the facts and circumstances pertaining to the Miami Beach Hotel Association and is familiar therewith.

2. On or about the 9th day of August, 1955 plaintiffs filed a Brief upon Request for Review which set forth the facts pertaining to the effect on commerce of a question of representation of the Miami Beach Hotel Association; that excerpts from said brief are attached hereto, [fol. 18] marked Exhibit "A" and made a part hereof; that upon information and belief the facts contained in said brief are true; and the defendant Board has never afforded plaintiffs an opportunity to present evidence to substantiate said facts.

3. On or about the 7th day of July, 1955, plaintiffs did file with the Regional Director of the Tenth Region of

the National Labor Relations Board a charge against members setting forth innumerable actions constituting unfair labor practices (a copy of said charge is attached hereto, marked Exhibit "B" and made a part hereof). On information and belief, said charges are true and the Regional Director dismissed said charges without investigating same to ascertain the truth thereof and said dismissal was sustained by the General Counsel of the National Labor Relations Board without investigating said facts.

4. The decision and order of the Board attached to defendants' Affidavit to Exhibit 6 was rendered without reference to the above facts and without affording plaintiffs an opportunity to present said facts.

Further affiant saith not.

/s/ Jonas B. Katz

[fol. 18-a]

EXHIBIT A TO AFFIDAVIT OF JONAS B. KATZ

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

DOCKET NO. 10-RC-3135

In the Matter of:

ALL HOTEL MEMBERS OF MIAMI BEACH HOTEL ASSOCIATION,

and

HOTEL EMPLOYEES UNION LOCAL NO. 255, HOTEL & RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION, A. F. L.

BRIEF OF THE PETITIONER UPON REQUEST FOR REVIEW

J. W. BROWN,
General Counsel, Hotel & Restaurant Employees and Bartenders International Union

August 9, 1955

II

The Labor Dispute Involving the Miami Beach Hotels of Necessity Has A Pronounced Impact On The Flow Of Interstate Commerce.

The tourist industry in the Greater Miami and Miami Beach area ranks first in that area (Miami Economic Research, January, 1955, Volume 8, Number 1, p. 7) and the hotel industry is the primary and indispensable component. (Miami Daily News, Ex. 2 attached).

[fol. 18-b] During the year ending September, 1954, the four county area including Miami and southeast Florida had 2,560,000 visitors, (the greatest number of whom were accommodated by the hotel industry) who spent 47,600,000 visitor days and $513,000,000. Of this amount, $376,000,000 was spent in Dade County (Miami–Miami Beach) alone. This represents one-third of all spending in this county. $235,000,000 was spent in the Miami Beach area alone. This is equivalent to two and one-half times the spending of the residents of Miami Beach.

The hotel industry in Miami Beach has more than 30,000 units, employs approximately 12,000 people in all categories, and received for the year ending September, 1954, in excess of $74,000,000 for hotel lodging from visitors from outside of the state of Florida. These hotels also received in excess of $27,000,000 for food from these visitors. Thus the hotel industry of Miami Beach received over $100,000,000 in revenue from tourists moving in the chain of commerce. (Bureau of Economic Research, University of Miami).

The tourist industry of Miami and Miami Beach represents the leading industry of the area and produces more than the income of the next two leading industries (Miami Daily News, 3/16/1955, Ex. 2 attached). In 1949, when the tourist trade in the Greater Miami area was only $243,000,000 as compared with $376,000,000 in 1954, the income of the next leading industry (airline operations and repairs) was only $105,000,000, and income from all manufacturing was only $45,000,000; fruit and vegetable growing produced only $13,700,000 in total income.

In addition, the hotel industry of Miami Beach is closely allied to all types of interstate transportation systems.

During the year ending September, 1954, the airlines alone transported over 1,200,000 tourists to the Greater Miami area, the greatest number of these people being destined for accommodations in the hotels of the employer association herein.

The volume of interstate transportation connected with the employer association is readily apparent by reference [fol. 18-c] to the fact that for the period of September, 1953 through March of 1954, Eastern Airlines route from New York to Miami was first ranked in revenue production of all routes in the United States and National Airlines route from New York to Miami was second ranked. Eastern Airlines, during the aforementioned period, transported over 25,000 persons and received revenue in excess of $28,000,000. National Airlines transported in excess of 23,000 persons with revenue in excess of $25,000,000. Delta Airlines route from Chicago to Miami was sixth in rank throughout the United States with in excess of a $5,700,000 revenue. (Exhibits of North East Airlines in CAB hearing Docket No. 3051).

In addition, the airlines and hotels have entered into extensive contracts for "package vacation tours" which provide a single rate covering hotels, meals and travel. During the present year, Eastern Airlines and National Airlines alone will sell in offices outside the state of Florida in excess of $2,000,000 in hotel accommodations for members of the employer association herein, Eastern Airlines alone sold 55,000 package tours.

It is clearly apparent from the foregoing that a labor dispute at all Miami Beach hotels materially affects commerce within the meaning of the act and it is further submitted that Eastern Airlines and National Airlines, Delta, Florida East Coast Railway, Atlantic Coastline, etc., and all other carriers servicing this area would emphatically concur in this conclusion.

The extensive interstate commerce operations of the employer association and the hotels individually clearly bring them within the present jurisdictional standards of the National Labor Relations Board (See Ex. 3, Travel Section, N.Y. Times, 8/7/1955). These operations are such that a labor dispute involving these hotels is certain

to "have a pronounced impact on the flow of interstate commerce". *Hogue & Knott Supermarkets, Inc.*, 110 NLRB No. 68.

It cannot be disputed that a hotel by its very nature is a link in interstate commerce, and therefore the jurisdictional standards set forth by the Board in *Breeding* [fol. 18-d] *Transfer Co.*, 110 NLRB No. 64 is applicable. Likewise, it may be considered within the jurisdictional standards of *Jonesboro Grain Drying Cooperative*, 110 NLRB No. 67, wherein the Board stated that it will assert jurisdiction over

> "an enterprise which furnished goods or services to other enterprises coming within subparagraph #2 above, or to public utilities or transit systems or instrumentalities or channels of commerce and their essential links which meet the jurisdictional standards established for such enterprises and (a) such goods or services are directly utilized in the product service or process of such enterprise and are valued at $100,000 or more, (b) such goods or services regardless of their use are valued at $200,000."

The Board has recently applied the *Breeding* doctrine to a warehouse which stored merchandise coming from outside the state and which was thereafter shipped outside the state (*United Warehouses and Terminal Corp.*, 112 NLRB 121). It is submitted that the *Breeding* doctrine would likewise apply to hotels as well as warehouses, one dealing in commodities; the other dealing with human beings.

We submit that the proper jurisdictional standards to be applied to the hotel industry is that set forth in *Breeding Transfer Co.*, supra, as follows:

> "We have determined that in future cases the Board will assert jurisdiction over transportation operations or other local activities which constitute a link in the chain of interstate commerce only where the annual income received by the particular company involved from services which constitute a part of interstate commerce total no less than $100,000."

[fol. 18-e] IV

The Anarchical Status of Florida With Regard To Labor Disputes.

The instant case would not have arisen before this Board had Florida provided any means for settling labor disputes involving recognition of bargaining agents. As a corollary, one might add that the National Labor Relations Act itself would not have been passed had every state in the union provided appropriate legislation for the settlement of labor disputes.

The few Florida laws pertaining to labor relations have created a situation that is worse than that found in states where there are no labor law enactments. For example, Section 447.03 provides that employees shall have the right to bargain through collective bargaining agents of their own choosing. No further details or requirements of any nature as to how such bargaining agents shall be selected are supplied. The various courts of the state have willingly furnished the balance of Florida regulations.

The petitioner herein has tried to follow the complex instructions of the courts in 22 injunction cases as to how it must establish its right to represent the striking employees in Miami Beach and a brief summary will illustrate the maze through which these instructions have carried it.

Picketing took place at all 22 hotels, and with only slight deviation, the reason for the picketing was that the employer refused to negotiate with the union. The employers uniformly answered this protest by stating that the union had not proved that it represented a majority of their employees, and that therefore the picketing was illegal. Some of the courts held that any strike activity on the part of the union without first proving to the satisfaction of the employer that the union represented a majority of its employees was illegal. In other cases the courts held that the union was required not only to establish its majority representation, but to give the employer advance notice of its demands and an opportunity to bargain on the same.

When the union tried to comply with these judicial enactments, and prove notice to the employer beyond dis-

[fol. 18-f] pute, a bargaining conference with one of the employers was arranged. The meeting, at which the union presented its proposals, broke up when the employer said. "I can't bargain with you because as a member of the Association I have been directed not to do so." The court then held that such notice to the employer was insufficient since "formal" notice was required to the employer.

When, in other cases, formal written notice to the Association and its Executive Board were proved, the courts held that the notice should have been given to the individual hotels and not to the Association and its Executive Board members even though the particular Executive Board members who received copies of the notice were owners of the hotels involved in the cases at bar. In such cases, the president of the Hotel Association denied that he had notice that the union wished to bargain with him, because when he received it he was acting in his capacity as an Association officer and not as a hotel owner.

Although most of the courts were insistent that we had to prove our representation before being entitled to bargain or to picket for refusal to bargain, none of the courts would state exactly what procedure we were required to follow in order to comply with their edicts. It was sufficient for the courts to find that no matter what we did, we hadn't properly proved our right to represent our members.

For instance, two Supreme Court judges took different positions. One said we had to establish to the satisfaction of the employer that we represented a majority; the other said we had to establish to the satisfaction of the court that we represented a majority. We attempted to do it both ways. We asked the employers to suggest a procedure which would satisfy them, such as a secret election conducted under the auspices of the Governor (who was willing), under the auspices of the Mayor of Miami (who was willing), or by any other public citizens' group whom *they* might select. This was refused. We employed a certified public accountant to check over the personally signed authorization cards and to certify the result, but one court said this didn't prove anything, since the certified public accountant did not see the employees sign the

[fol. 18-g] cards. Then we had the certified public accountant interview each employee and ask him whether his signature on the authorization card was genuine.

Another court found that this was insufficient proof of representation.

Following this, at our next injunction proceeding, we brought before the court all the striking employees, constituting 75% of the hotels' employees. These were sworn, identified as strikers, and they stated under oath that the union represented them. In spite of this, the court found our representation defective and our strike illegal.

The climax of the "Fantasyland" proceedings we followed in Florida came when one judge, attempting to clear a path through the court obstacles, made the following order: Since, said the judge, under the Florida Supreme Court decisions in our cases we had to establish our right to represent the employees, he would order an election to be conducted by a Master Commissioner appointed by the court. And in order that the election might be conducted under the most unprejudicial circumstances, he ordered the union to cease picketing until the election had been completed. Thus, he said, the vote would be conducted in a proper atmosphere free from any coercive influences.

One would have thought that this would have made the hotel concerned happy. The picket line was lifted and machinery was set up for determining representation rights of its employees. Quite the contrary—the employer appealed to the Florida Supreme Court for supersedeas bond to hold up the enforcement of this order pending the hotel's appeal to the Florida Supreme Court on the question of whether the court had the right to make such an order. But the odd thing about the appeal to the Supreme Court was that the owner of the hotel didn't want to supersede the entire order, but only that part of it which applied to the election. He was quite content that that part of the order restraining the picketing until the election could be held, be continued in force. The Florida Supreme Court, however, granted the hotel's request by superseding only that part of the order below providing for an election and leaving the ban on picketing intact.

[fol. 18-h] August 13 of this year will mark the end of four months' strike for more than 3,000 Miami Beach hotel employees. In that time the Miami Beach Hotel Association has fervantly maintained through paid advertisements and other public statements that the union does not represent any of its employees and, therefore, its members will not negotiate with the union. At the same time, these employers have piously repeated that they are not hostile to the union and will negotiate with it when it has proven its right to represent their employees. This has been their position in 28 Circuit Court injunction trials and arguments in 15 Florida Supreme Court cases.

The employers' "double talk" and obvious insincerity throughout the Miami Beach cases was not lost upon all the judges, however. Three judges reached the conclusion expressed in the opinion of Judge Robert L. Floyd that:

> ". . . the representatives of the defendant union did inform the plaintiff of the object to be accomplished by the picketing prior to April 16, 1955, and that the plaintiffs did evade and stall the representatives of the defendant union to an extent that no reasonable man could conclude other than that these evasive tactics were for any other purpose than refusing to negotiate. It is apparent from the record in this cause that the course of conduct engaged in by the plaintiffs after the plaintiffs learned of, and were informed about, the defendant union's desire to negotiate was designed to thwart any attempts by the defendant union to be able to point to any concrete evidence that negotiations were, in fact, refused. It was as though a 'cat and mouse' game was the weapon to be used by the plaintiffs with the ultimate hope that the union's representatives would tire of playing and finally look elsewhere for recreation. This, the union refused to do, however, and the picket line was the result."

[fol. 18-i] The foregoing illustrations are only the barest summary of the legal jungle for the settlement of a labor dispute through which the union has been fighting its way. Many more illustrations could be furnished, such as notifi-

cation to the union at 7:45 on a Saturday evening that an injunction case would be heard at 8:00 the same evening, which continued on until 1:00 A. M. Sunday morning when an injunction was granted restraining picketing; the issuance of a temporary injunction by a court after only one side of the case had been heard, even though the court below had held that plaintiff had not sustained his allegations sufficiently to entitle him to any type of injunction; and the issuance of an injunction by one judge even though the judge who properly had charge of the case already refused to issue an injunction.

The significance of these illustrations in the instant cause is this: The wisdom of Congress in establishing an orderly procedure under the National Labor Relations Act for determining questions of representation is well illustrated in Miami. The necessity for the intervention of a properly qualified body to assume jurisdiction over these otherwise interminable disputes is likewise demonstrated. Florida offers only legalized anarchy for solving labor disputes.

The National Labor Relations Board, operating under well-defined rules of procedure, could in a short time settle these disputes. Otherwise, they are certain to end in an endurance contest of economic strength with thousands of innocent persons and Florida's largest industry suffering the effects of this interruption to commerce.

[fol. 19]

EXHIBIT 1 TO EXHIBIT "A"

THE NEW YORK TIMES, WEDNESDAY, AUGUST 3, 1955.

THE NEW YORK TIMES
Reg. U. S. Pat. Off.
"All the News That's Fit to Print"

Adolph S. Ochs, Publisher 1896-1935

"TAFT-HARTLEY" AND HOTELS

Next Monday the National Labor Relations Board is scheduled to hold a hearing of national interest and im-

portance. The basic issue involved has already aroused the entire labor movement and it also urgently concerns the public: orderly collective bargaining.

The case has grown out of the strike—now in its third month—through which the A. F. L. Hotel and Restaurant Workers Union seeks recognition as bargaining agent for the 6,000 employes of 164 Miami hotels. The employers have refused to agree. Nor is there any Florida law, as in New York and many other states, under which the union could compel such recognition, even if an election showed a majority of the workers involved so desired a procedure which Federal law prescribes for businesses affecting interstate commerce.

In the absence of a Florida law of this kind the union brought an unfair labor practice charge against the hotels under the Taft-Hartley Act. But the Atlanta regional office of the N. L. R. B. refused to accept jurisdiction and the union has appealed to the national board. Next Monday's hearing will give each side its day in court, pending a final decision as to jurisdiction in the case.

The basic technical question involved, of course, is whether the hotel industry—said by the union to be seventh in size, doing a $2.5 billion business with some 500,000 employes—affects interstate commerce within the meaning of the law. But also involved is a growing resentment by labor over actions taken by the present majority of the N. L. R. B. to narrow its own jurisdiction. Minority board member Murdock has estimated that from one-quarter to one-third of the board's past jurisdiction has been eliminated.

[fol. 20] But concern over the situation isn't confined to labor. Senator Lehman has introduced a bill specifically bringing the entire hotel industry within the purview of the Taft-Hartley Act and has brought about an investigation, already begun, of N. L. R. B. policies by a Senate Labor subcommittee. Certainly the operation of the Miami hotels affects interstate commerce. It is equally certain that public policy—and the obvious intent of Congress—call for the widest possible application of orderly collective bargaining guarantees and procedures.

EXHIBIT 3 TO EXHIBIT "A"

(See Opposite)☞

[fol. 21]

Cameraman's Note

Pages 30 - 33 are not reproduceable.

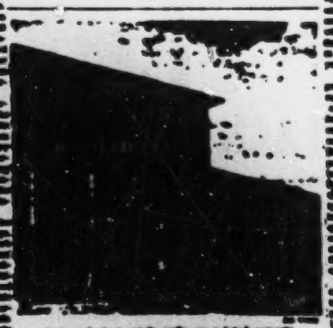
R. 31
JA 22

22

(p. 31)

NTROVERSY OVER LODGE IN E EST

Jackson Hole Hotel Architecture Stirs Debate Over National Parks Design



What a time at the Robert Richter... my vacation is simply wonderful!
...and it only $6*

Had your Vacation yet?
IT ISN'T TOO LATE—IN
Florida
CHAMPION Vacations

RICHTER

Monte Carlo
$7

Special
$5
Ritz Plaza

San Marino
6

SHORE CLUB
SUMMER
Fiesta

FLY
MIAMI '35
CALIFORNIA '00
CHICAGO... '34

CARIB
2

Sea Gull

31

[fol. 22]

R. 40
JA 23 23

(p. 82)

BRITONS' HOLIDAYS

Paid Vacations in Industry Bring a Big Change in England's Resort Trade

$7 Fabulous
INCLUDING MEALS
Sherry Frontenac
ON THE OCEAN AT 44th ST., MIAMI BEACH

DID YOU SAY 6 50? and WITH MEALS!
SHARE PLAN: $1 Per Person Daily
Sovereign
Swimming Pool • Cabana Club
Private Beach
See Your Travel Agent
DIRECTLY ON THE OCEAN AT 46th STREET—MIAMI BEACH

SUMMER JAMBOREE at the Empress
$7 INCLUDING WONDERFUL MEALS

A HOLIDAY WITH NO HAY FEVER AT THE SEASHORE
The Sorrento
$7 INCLUDING YOUR MEALS
HOME HIGHER

$4 Belmar
AIR CONDITIONED
Free MIAMI BEACH
LOWEST FARE DC-6B
'88 NON-STOP TO '72 CALIFORNIA
MIAMI - 4 hrs. $39
DALLAS $56 • CHICAGO $74
NORTH AMERICAN
NO HAY FEVER!
Saxony
Seven dollars
New Promenade
$27
Allison
$7.50
5 DAYS 6 NIGHTS $22.50
MARSEILLES
RENDALE
$2.50
Versailles
$3
$5
SHELBORNE

~~R. 41~~
~~JA 21~~ 24

(p. 33)

A GLIMPSE OF PRE-TO...AT EUROPE IN SARDINIA

Check List

of late summer attractions in delightful sea-cooled

FLORIDA

TO SEE HOW MUCH YOU GET AT THE

Roney Plaza

MIAMI BEACH

Check this list—

and Double check this—

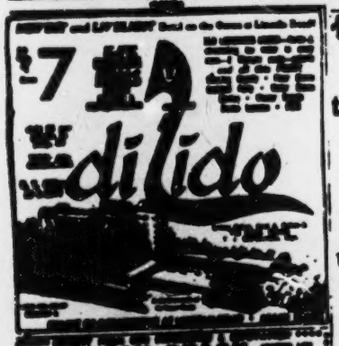
Now Check in at the—

• Luxurious rooms with bath • TV in your room—no charge • Completely air-conditioned—no charge • Complete golf practice facilities • Easy-on private pool • Magnificent Cabana Sun Club • 3 restaurants • Tennis privileges • Pleasant entertainment • Beach parties and dances

• 7 acres of private tropical gardens • 3 city blocks of private beach • Roney's famous cuisine

ROney PLAZA

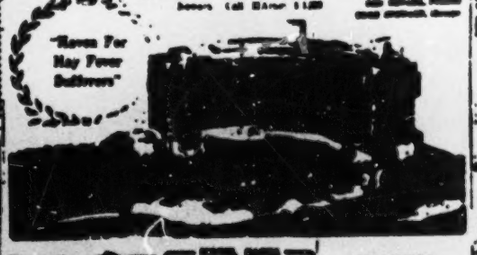
All for Only $5.00 a day

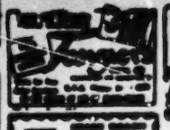


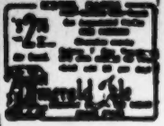
NOW... you can vacation in true magnificence at the incomparable

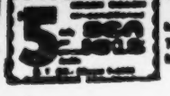
Fontainebleau

unsurpassed luxury...and for so little!









Show Stopper!

$8

Biltmore Terrace

[fol. 24]

[fol. 25]

EXHIBIT 2 TO EXHIBIT "A"

MIAMI DAILY NEWS

Miami 30, Florida Wednesday Evening, March 16, 1955

Equals Business Rivals

TOURIST DOLLAR STILL OUR NO. 1 'BREADWINNER'

By Mac Smith
Miami Daily News Staff Writer

Despite business growth, the economic health of Dade county still depends very much on a $150,000,000 tourist pill swallowed annually in spite of arterial strangulation.

Dr. Reinhold P. Wolff, head of the University of Miami Bureau of Business and Economic Research, today said the tourist industry equals its next two rivals, factories and building, as an income producer.

In releasing the results of the survey of tourism for several years, Dr. Wolff pointed out a number of important changes in South Florida's No. 1 "breadwinner".

He will make a detailed report on what he said were the first figures ever compiled on the complex relationship of tourist trade in our economy at a meeting of the Economic Society of South Florida. The meeting which is open to the public will be at 8 p. m. today at the Florida Power and Light Co. Ryan Bldg., 400 SW 2nd Ave.

Wolff's figures showed that the southeast "Gold Coast" area which gets 52 per cent of Florida's total tourist business still depends on roads to bring it 70 per cent of its winter visitors. But, he pointed out, plane travel is rapidly approaching the automobile as a means of travel to the Miami area.

"Travel Economy"

"We are now in the process of changing from a resort economy to a travel economy," Wolff said. "Tourists don't come to find a resort to spend the winter now. More often they stay a few days to sightsee and travel on to see other places."

[fol. 26] In this respect he speculated that the opening of numerous Caribbean resorts would not hurt Miami's

tourist business as some feared, but would actually help it by making this area a hub of a great travel center.

He said Miami's secondary industries helped it weather last year's recession very well even though he pointed out the area was definitely affected by the decline, especially in travel businesses. His records show factories now rate second in importance in dollar payrolls here producing 80 millions and is followed by building payrolls of 70 million; government, 70 million, and airlines, 60 million.

While factories help equalize the economy, Wolff warned that if they were developed to the extent they have been in Southern California they could harm our important tourist business.

Sets Annual Record

"We don't want to lose what we already have," he said. Each year, at our present rate of growth, the tourist boom sets new records annually.

"That is," Wolff added, "more tourists come to Florida. But there are still some people in the tourist business who are losing money because the competition is so terrific."

EXHIBIT B TO AFFIDAVIT OF JONAS B. KATZ

United States of America—National Labor Relations Board

CHARGE AGAINST EMPLOYER

Where a charge is filed by a labor organization, or an individual or group acting on its behalf, a complaint based upon such charge will not be issued unless the charging party and any national or international labor organization of which it is an affiliate or constituent unit have complied with section 9(f), (g), and (h) of the National Labor Relations Act.

* * * * *

1. Employer Against Whom Charge Is Brought

Name of Employer: Miami Beach Hotel Assn. and (Continued on Attached Sheet)

[fol. 27] Number of Workers Employed: 6000

Address of Establishment (Street and number, city, zone and State):

1 Lincoln Rd., Miami Beach, Fla. & (See Attached Sheet)
Type of Establishment (Factory, mine, wholesaler, etc.):
Hotel
Identify principal product or service: Lodging and/or Food.

The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and (3) and (5) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the act.

2. Basis of the Charge (Be specific as to facts, names, addresses, plants involved, dates, places, etc.):

See "Exhibit A" attached.

3. Full Name of Party Filing Charge (if labor organization, give full name, including local name and number):

Hotel Employees Union Local No. 255

4. Address (Street and number, city, zone, and State):

1575 Washington Avenue, Miami Beach, Fla.
Telephone No.: Je 8-0539

5. Full Name of National or International Labor Organization of Which It Is an Affiliate or Constituent Unit (To be filled in when charge is filed by a labor organization):

Hotel & Restaurant Employees & Bartenders International Union-AFL.

6. Address of National or International, if any (Street and number, city, zone, and State):

525 Walnut Street—Cincinnati, Ohio
Telephone No.: Pa 1-8164

7. DECLARATION

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

ALBERT H. BERLIN,
INTERNATIONAL TRUSTEE

July 6, 1955

[fol. 28]

Name of Employer (continued): and all the Employer members thereof specifically including the following named Employers:

2500 COLLINS AVENUE CORP.
d/b/a ALGIERS HOTEL
2555 Collins Avenue
Miami Beach, Fla.

CASABLANCA OPERATING COMPANY, a partnership composed of Sol Cohen, Sam Cohen, Herbert Robins & Sidney Raffel d/b/a CASABLANCA HOTEL
6345 Collins Avenue
Miami Beach, Fla.

HOTEL DELMONICO INC. d/b/a DELMONICO HOTEL
6393 Collins Avenue
Miami Beach, Fla.

DiLIDO HOTEL INC. d/b/a DiLIDO HOTEL
155 Lincoln Road
Miami Beach, Fla.

INTERNATIONAL COMPANY INC. d/b/a EMPRESS HOTEL
4333 Collins Avenue
Miami Beach, Fla.

STUYVESANT INC. d/b/a LOMBARDY HOTEL
6305 Collins Avenue
Miami Beach, Fla.

MARTINIQUE HOTEL INC. d/b/a MARTINIQUE HOTEL
6423 Collins Avenue
Miami Beach, Fla.

MONTE CARLO INC. d/b/a MONTE CARLO HOTEL
6551 Collins Avenue
Miami Beach, Fla.

SOL COHEN, SIDNEY RAFFEL, HERBERT ROBBINS, SAMUEL COHEN d/b/a
PRESIDENT MADISON HOTEL
3801 Collins Avenue
Miami Beach, Fla.

BOCA RATON CLUB & HILDEMART CORP.
d/b/a RONEY PLAZA HOTEL
2301 Collins Avenue
Miami Beach, Fla.

LEEVLANS INC. d/b/a
SANS SOUCI HOTEL
3101 Collins Avenue
Miami Beach, Fla.

SAX ENTERPRISES INC. d/b/a
SAXONY HOTEL
3201 Collins Avenue
Miami Beach, Fla.

SEA ISLE HOTEL INC. d/b/a
SEA ISLE HOTEL
3001 Collins Avenue
Miami Beach, Fla.

HARRY LEVY, MARK ALLEN, LEVY TRUST, ERWIN J. FRIED, GENERAL OPERATING COMPANY, ALEX T. SPARE, MORRIS LANSBURGH CO., JAMES PAULEN, ALVIN C. RICHTER, ALBERT GREEN, CHESTER and SALLY KRONE, HARRY A. LEVY IRREVOCABLE TRUST, MINNIE GINSBERG, JEROME GRANGER d/b/a
SHERRY FRONTENAC HOTEL
6565 Collins Avenue
Miami Beach, Fla.

[fol. 29]

A. H. S. CORPORATION d/b/a
NAUTILUS HOTEL
1825 Collins Avenue
Miami Beach, Fla.

MORRIS LANSBURGH, DANIEL
LIFTER d/b/a ROBERT
RICHTER HOTEL
3301 Collins Avenue
Miami Beach, Fla.

SORRENTO HOTEL CORPORATION d/b/a
SORRENTO HOTEL
4391 Collins Avenue
Miami Beach, Fla.

THOMAS JEFFERSON, INC.
d/b/a SAN MARINO HOTEL
4299 Collins Avenue
Miami Beach, Fla.

GOLDEN GATE HOTEL INC.
d/b/a GOLDEN GATE HOTEL
19400 Collins Avenue
Miami Beach, Fla.

NAME OF EMPLOYER (CONT'D) AND ALL MEMBERS THEREOF AND ESPECIALLY INCLUDING THE FOLLOWING NAMED EMPLOYER MEMBERS:

KIRKEBY HOTEL INC. d/b/a
KENILWORTH HOTEL
10205 Collins Avenue
Miami Beach, Fla.

R. S. LEVY, DANIEL LIFTER &
J J LANSBURGH AS TRUSTEE
FOR THE ELLEN LANSBURGH
TRUST, THE MORRIS LANSBURGH, JR. TRUST AND THE
LEONARD LANSBURGH TRUST
d/b/a VERSAILLES HOTEL
3425 Collins Avenue
Miami Beach, Fla.

HARRY EVANS, ARTHUR
LEWIS, SAM GROSSMAN,
SAM GREENBERG d/b/a
SEA GULL HOTEL
100-21st Street
Miami Beach, Fla.

ISLE DE CAPRI INC. d/b/a
ISLE DE CAPRI HOTEL
7900 Harbor Island
Miami Beach, Fla.

LOUIS ADLER d/b/a
ALLISON HOTEL
6261 Collins Avenue
Miami Beach, Fla.

WOLF MULLER d/b/a
SHORE CLUB HOTEL
1901 Collins Avenue
Miami Beach, Fla.

BANCROFT HOTEL
1501 Collins Avenue
Miami Beach, Fla.

CARIBBEAN HOTEL
3737 Collins Avenue
Miami Beach, Fla.

DR. E. J. MINNELLI d/b/a
SURFCOMBER HOTEL
1717 Collins Avenue
Miami Beach, Fla.

JEROME GRANGER d/b/a
SOVEREIGN HOTEL
4385 Collins Avenue
Miami Beach, Fla.

BEN JAFFE, BEN NOVACK &
HERBERT GLASSMAN d/b/a
FONTAINEBLEAU HOTEL
4441 Collins Avenue
Miami Beach, Fla.

[fol. 30]

EXHIBIT "A"

The Employer Association and the individual hotel members of said Association, acting individually and in concert with each other, have since the 10th day of January, 1955, interfered with, restrained and coerced and continue to interfere with, restrain and coerce employees in the hotel industry in Miami Beach, Florida in the exercise of their rights and guarantees under the Act, and have failed and refused and are now failing and refusing to bargain in good faith with the Hotel Employees Union, Local #255 which labor organization is the duly designated collective bargaining representative of the overwhelming majority of the Employees of the Employer Hotel members of said Association.

The Miami Beach Hotel Association and the individual Hotel Members thereof since the beginning of organizational activity have conspired to flaunt the provisions of the Labor Management Relations Act and to thereby destroy the rights of employees guaranteed under the Act. Said Association and the individual Hotel Member thereof, their officers, agents, and employees, have conspired to and engaged in, and contributed great sums of money to finance an illegal and unlawful plan to:

1. Deliberately violate their lawful obligation and/or obligations to bargain collectively with the collective bargaining representative of their employees; and

2. To interfere with, restrain, and coerce employees in the exercise of their rights.

Set forth below are in part the Acts of the Employer Association and the individual Employer Members thereof in furtherance of said conspiracy:

I

In furtherance of said conspiracy to interfere with, restrain and coerce employees in the exercise of their rights said Employer Hotel Association and all the individual members thereof acting individually and in concert by their officers, agents and employees have discharged hundreds of employees because of their membership in and activity on behalf of Hotel Employees Union Local #255. [fol. 31] Among the hundreds of deliberate acts of discriminatory discharges, the following acts have been committed:

(a) On or about the 18th day of April, 1955, the 2500 COLLINS AVENUE CORPORATION D/B/A ALGIERS HOTEL by its officers, agents and employees discharged CARL HYLLESTED because of his membership in and activities for and on behalf of HOTEL EMPLOYEES UNION LOCAL #255.

(b) On or about the 25th day of May, 1955, the HOTEL DELMONICO, INC., D/B/A DELMONICO HOTEL by its officers, agents and employees discharged CASEY ROSADO because of his membership in and activities for and on behalf of HOTEL EMPLOYES UNION LOCAL #255.

(c) On or about the 25th day of May, 1955, the HOTEL DELMONICO, INC., D/B/A DELMONICO HOTEL by its officers, agents and employees discharged CARLOS ACOSTA because of his membership in and activities for and on behalf of HOTEL EMPLOYEES UNION LOCAL #255.

(d) On or about the 2nd day of April, 1955, the INTERNATIONAL COMPANY, INC., D/B/A EMPRESS HOTEL by its officers, agents and employees discharged HARRY HAINES because of his membership in and activities for and on behalf of HOTEL EMPLOYEES UNION LOCAL #255.

(e) On or about the 23rd day of June, 1955, the FONTAINEBLEAU HOTEL by its officers, agents and employees discharged COSME FERNANDEZ because of his membership in and activities for and on behalf of HOTEL EMPLOYEES UNION LOCAL #255.

(f) On or about the 8th day of May, 1955, the FONTAINEBLEAU HOTEL by its officers, agents and employees discharged HONOREUS GUERIN because of his membership in and activities for and on behalf of HOTEL EMPLOYEES UNION LOCAL #255.

(g) On or about the 26th day of April, 1955, the FONTAINEBLEAU HOTEL by its officers, agents and employees discharged JOHN KETTER because of his membership in and activities for and on behalf of HOTEL EMPLOYEES UNION LOCAL #255.

[fol. 32] (h) On or about the 24th day of June, 1955, the FONTAINEBLEAU HOTEL by its officers, agents and employees discharged HARRY HAINES because of his membership in and activities for and on behalf of HOTEL EMPLOYEES UNION LOCAL #255.

(i) On or about the 8th day of May, 1955, the FONTAINEBLEAU HOTEL by its officers, agents and employees discharged WALTER MURPHY because of his membership in and activities for and on behalf of HOTEL EMPLOYEES UNION LOCAL #255.

(j) On or about the 15th day of June, 1955, the ISLE DE CAPRI HOTEL by its officers, agents and employees discharged DAVID MORGAN because of his membership in and activities for and on behalf of HOTEL EMPLOYEES UNION LOCAL #255.

(k) On or about the 20th day of June, 1955, the MARTINIQUE HOTEL, INC., D/B/A MARTINIQUE HOTEL by its officers, agents and employees discharged WILLIAM RAYNIER because of his membership in and activities for and on behalf of HOTEL EMPLOYEES UNION LOCAL #255.

(l) On or about the 15th day of June, 1955, the MARTINIQUE HOTEL, INC., D/B/A MARTINIQUE HOTEL

by its officers, agents and employees discharged CLARENCE ZIGLAR because of his membership in and activities for and on behalf of HOTEL EMPLOYEES UNION LOCAL #255.

(m) On or about the 25th day of May, 1955, SOL COHEN ET AL D/B/A PRESIDENT MADISON HOTEL by its officers, agents and employees discharged BLANCHE WALTERS because of her membership in and activities for and on behalf of HOTEL EMPLOYEES UNION LOCAL #255.

(n) On or about the 10th day of June, 1955, MORRIS LANSBURGH ET AL D/B/A ROBERT RICHTER HOTEL by its officers, agents and employees discharged ELSIE METZGER because of her membership in and activities for and on behalf of HOTEL EMPLOYEES UNION LOCAL #255.

(o) On or about the 26th day of June, 1955, MORRIS [fol. 33] LANSBURGH ET AL D/B/A ROBERT RICHTER HOTEL by its officers, agents and employees discharged EDWARD COX because of his membership in and activities for and on behalf of HOTEL EMPLOYEES UNION LOCAL #255.

(p) On or about the 26th day of June, 1955, MORRIS LANSBURGH ET AL D/B/A ROBERT RICHTER HOTEL by its officers, agents and employees discharged HARRY BARTLEY because of his membership in and activities for and on behalf of HOTEL EMPLOYEES UNION LOCAL #255.

(q) On or about the 10th day of January, 1955, the SAX ENTERPRISES, INC., D/B/A SAXONY HOTEL by its officers, agents and employees discharged BRUCE WATTS because of his membership in and activities for an on behalf of HOTEL EMPLOYEES UNION LOCAL #255.

(r) On or about the 25th day of June, 1955, the SEA GULL HOTEL by its officers, agents and employees discharged LEONARD SMITH because of his membership in and activities for an on behalf of HOTEL EMPLOYEES UNION LOCAL #255.

(s) On or about the 7th day of June, 1955, R. S. LEVY ET AL D/B/A VERSAILLES HOTEL by its officers, agents, and employees discharged ROSE YASCHALK because of her membership in and activities for and on behalf of HOTEL EMPLOYEES UNION LOCAL #255.

II

In furtherance of said conspiracy to interfere with, restrain and coerce employees, said Employer Association and all the individual Employer Members thereof, their officers, agents and employees have conspired to refuse employment to and to black-list members of HOTEL EMPLOYEES UNION LOCAL #255 who have engaged in concerted protected activitiy including striking and picketing (as set forth in VI below) at numerous Employer Hotel Members of said Association.

Said Association did set up an employment office at 600 Lincoln Road on or about the 16th day of April, 1955, which employment office is used by said Association and the individual members thereof for the purpose of supplying employees to the various members of said Association. Said office has uniformly refused to give employment or [fol. 34] recommendations for employment to any employees who are members of Hotel Employees Union Local #255 and/or who have been on strike at any of the hotels referred to in Paragraph VI below. Said Association has in its possession a list of said employees who have engaged in said concerted activity which list constitutes a "black-list" from employment in the Miami Beach Hotel Industry.

In furtherance of said conspiracy to black-list members of Local #255 who have been engaged in concerted protected activity said Employer Hotel Association and the individual Hotel Members of said Association set forth below have committed the following acts:

(a) On or about the 29th day of June, 1955, the aforementioned Hotel Employment Agency refused to give employment or reference to HERBERT SCHIFFMAN and AMANDO VAZQUEZ because of their membership in and activities for and on behalf of HOTEL EMPLOYEES UNION LOCAL #255.

(b) On or about the 30th day of June, 1955, the 2500 COLLINS AVENUE CORPORATION, D/B/A ALGIERS HOTEL, by its officers, agents and employees did refuse to hire and employ (Miss) WOODROW COKER because of her membership in and activities for and on behalf of HOTEL EMPLOYEES UNION LOCAL #255.

(c) On or about the 16th day of April, 1955, the BANCROFT HOTEL by its officers, agents and employees did refuse to hire and employ ANNA REYNOLDS because of her membership in and activities for and on behalf of HOTEL EMPLOYEES UNION LOCAL #255 and especially because of her status as a striker at the MONTE CARLO HOTEL.

(d) On or about the 16th day of April, 1955, the BANCROFT HOTEL by its officers, agents and employees did refuse to hire and employ NATHAN KELLY because of his membership in and activities for and on behalf of HOTEL EMPLOYEES UNION LOCAL #255 and especially because of his status as a striker at the MONTE CARLO HOTEL.

[fol. 35] (e) On or about the 15th day of June, 1955, the CARIBBEAN HOTEL by its officers, agents and employees did refuse to hire and employ HARRY HAINES because of his membership in and activities for and on behalf of HOTEL EMPLOYEES UNION LOCAL #255 and especially said activities at the EMPRESS HOTEL.

(f) On or about the 1st day of July, 1955, the INTERNATIONAL COMPANY, INC., D/B/A EMPRESS HOTEL by its officers, agents and employees did refuse to hire and employ (Miss) WOODROW COKER because of her membership in and activities for and on behalf of HOTEL EMPLOYEES UNION LOCAL #255 and especially because of said activities at the CASABLANCA HOTEL.

(g) On or about the 14th day of June, 1955, the FONTAINEBLEAU HOTEL by its officers, agents

and employees did refuse to hire and employ LEO DANIELS because of his membership in and activities for and on behalf of HOTEL EMPLOYEES UNION LOCAL #255 and especially because of said activities at the CASABLANCA HOTEL.

(h) On or about the 7th day of June, 1955, the FONTAINEBLEAU HOTEL by its officers, agents and employees did refuse to hire and employ ETHEL AGID because of her membership in and activities for and on behalf of HOTEL EMPLOYEES UNION LOCAL #255 and especially because of said activities at the SAXONY HOTEL.

(i) On or about the 5th day of June, 1955, the FONTAINEBLEAU HOTEL by its officers, agents and employees discharged SAM MANSOUR because of his membership in and activities for and on behalf of HOTEL EMPLOYEES UNION LOCAL #255 and especially because of said activities at the SAXONY HOTEL.

(j) On or about the 1st day of June, 1955, the GOLDEN GATE HOTEL by its officers, agents and employees did refuse to hire and employ JOSEPH MULESKEY because of his membership in and activities for and on behalf of HOTEL EMPLOYEES UNION LOCAL #255 and especially because of said activities at the CASABLANCA HOTEL.

[fol. 36] (k) On or about the 16th day of June, 1955, the KENILWORTH HOTEL by its officers, agents and employees did refuse to hire and employe BEATRICE HUTCHINSON because of her membership in and activities for and on behalf of HOTEL EMPLOYEES UNION LOCAL #255 and especially because of said activities at the SEA ISLE HOTEL.

(l) On or about the 10th day of June, 1955, the MARTINIQUE HOTEL, INC., D/B/A MARTINIQUE HOTEL by its officers, agents and employees discharged MIKE FILLOT because of his membership in and activities for and on behalf of HOTEL EM-

PLOYEES UNION LOCAL #255 and especially because of said activities at the CASABLANCA HOTEL.

(m) On or about the 27th day of April, 1955, the MARTINIQUE HOTEL, INC., D/B/A MARTINIQUE HOTEL by its officers, agents and employees discharged LEO DANIELS because of his membership in and activities for and on behalf of HOTEL EMPLOYEES UNION LOCAL #255 and especially because of said activities at the CASABLANCA HOTEL.

(n) On or about the 22nd day of April, 1955, the MARTINIQUE HOTEL, INC., D/B/A MARTINIQUE HOTEL by its officers, agents and employees did refuse to hire and employ RON MENDORF because of his membership in and activities for and on behalf of HOTEL EMPLOYEES UNION LOCAL #255 and especially because of said activities at the CASABLANCA HOTEL.

(o) On or about the 5th day of June, 1955, the SAX ENTERPRISES, INC., D/B/A SAXONY HOTEL by its officers, agents and employees did refuse to hire and employ KENNETH PERGONTIS because of his membership in and activities for and on behalf of HOTEL EMPLOYEES UNION LOCAL #255 and especially because of said activities at the DiLIDO HOTEL.

(p) On or about the 4th day of June, 1955, the SEA GULL HOTEL by its officers, agents and employees did refuse to hire and employ ARNOLD KIRSHNER [fol. 37] because of his membership in and activities for and on behalf of HOTEL EMPLOYEES UNION LOCAL #255 and especially because of said activities at the DiLIDO HOTEL.

(q) On or about the 18th day of April, 1955, the SEA GULL HOTEL by its officers, agents and employees discharged ELIZABETH PETERSON because of her membership in and activities for and on behalf of HOTEL EMPLOYEES UNION LOCAL

#255 and especially because of said activities at the ALGIERS HOTEL.

(r) On or about the 16th day of April, 1955, the SEA GULL HOTEL by its officers, agents and employees did refuse to hire and employ GEORGE DELEHAGEN because of his membership in and activities for and on behalf of HOTEL EMPLOYEES UNION LOCAL #255 and especially because of said activities at the CASABLANCA HOTEL.

(s) On or about the 25th day of May, 1955, the A. H. S. CORPORATION, D/B/A NAUTILUS HOTEL by its officers, agents and employees did refuse to hire and employ SAM MANSOUR because of his membership in and activities for and on behalf of HOTEL EMPLOYEES UNION LOCAL #255 and especially because of said activities at the SAXONY HOTEL.

(t) On or about the 1st day of May, 1955, the SURFCOMBER HOTEL by its officers, agents and employees, did refuse to hire and employ SAM MANSOUR because of his membership in and activities for and on behalf of HOTEL EMPLOYEES UNION LOCAL #255 and especially because of said activities at the SAXONY HOTEL.

(u) On or about the 7th day of May, 1955, the SURFCOMBER HOTEL by its officers, agents and employees did refuse to hire and employ MEL SMITH because of his membership in and activities for and on behalf of HOTEL EMPLOYEES UNION LOCAL #255 and especially because of said activities at the SAXONY HOTEL.

(v) On or about the 1st day of June, 1955, the SOVEREIGN HOTEL by its officers, agents and employees did refuse to hire and employ JOSEPH LIEBERMAN because of his membership in and [fol. 38] activities for and on behalf of HOTEL EMPLOYEES UNION LOCAL #255 and especially because of said activities at the SAXONY HOTEL.

(w) On or about the 29th day of June, 1955, R. S. LEVY ET AL, D/B/A VERSAILLES HOTEL by its officers, agents and employees did refuse to hire and employ EUGENE FENYOU because of his membership in and activities for and on behalf of HOTEL EMPLOYEES UNION LOCAL #255 and especially because of said activities at the CASABLANCA HOTEL.

III

In furtherance of said conspiracy to interfere with, restrain and coerce employees in the exercise of their rights the Employer Association and the individual members thereof acting individually and in concert and conspiracy with each other by their officers, agents and employees have committed physical acts of violence against employee members of Hotel Employees Union Local #255 while said employees were engaged in peaceful picketing of the various Hotel Members of said Association. Some of these acts of physical violence are as follows:

(a) On or about April 19, 1955, the CASABLANCA, INC., D/B/A the CASABLANCA HOTEL, by its agent and employees, JOFFRE NASSAUER, did violently assault without provocation ABRAHAM (AL) COHEN while said COHEN was peacefully engaged in acting as picket captain in front of said CASABLANCA HOTEL. Said employer did thereupon by its agent and employee falsely prosecute criminal charge against said COHEN, which charges are now pending.

(b) On or about the 20th day of April, 1955, HARRY LEVY ET AL D/B/A SHERRY FRONTENAC by its agents and employees, AMANDO PEREZ, WASHINGTON PEREZ and one CASTELLANI did physically and violently assault one, HERMAN SEROTA, a member of HOTEL EMPLOYEES UNION LOCAL #255 while said SEROTA was engaged in peacefully picketing said SHERRY FRONTENAC HOTEL.

[fol. 39] (c) On or about the 8th day of May, 1955, the DILIDO HOTEL, INC. by one of its principal

officers, THEODORE COHEN, did assault at gun point one JOSEPH BRUNWASSER, a member of HOTEL EMPLOYEES UNION LOCAL #255 while said BRUNWASSER was engaged in peacefully picketing said hotel and did force said employee at the point of a gun to cease picketing and accompany him inside the hotel.

(d) On or about the 5th day of May, 1955, the INTERNATIONAL COMPANY, INC., D/B/A EMPRESS HOTEL by its agent and employee, JACK McCORMICK at the direction of its officers did physically and violently assault one, JOSE BERROJO, a member of said HOTEL EMPLOYEES UNION LOCAL #255 while said BERROJO was peacefully picketing the premises of the EMPRESS HOTEL. Said Employer thereafter caused the arrest of said BERROJO for engaging in said peaceful concerted activity.

(e) On or about the 8th day of May, 1955, the INTERNATIONAL COMPANY, INC., D/B/A EMPRESS HOTEL by its agent and employee, JACK MULLALY, at the direction of its officers did physically and violently assault one, PRINCIPADO FELICIANO, a member of said HOTEL EMPLOYEES UNION LOCAL #255 while said FELICIANO was peacefully picketing the premises of the EMPRESS HOTEL. Said Employer thereafter caused the arrest of said FELICIANO for engaging in said peaceful concerted activity.

(f) On or about the 9th day of May, 1955, the INTERNATIONAL COMPANY, INC., D/B/A EMPRESS HOTEL by its agent and employee, HOWARD LOCKWOOD, at the direction of its officers, did physically and violently assault one, JACK HAGEDORN, a member of said HOTEL EMPLOYEES UNION LOCAL #255 while said HAGEDORN was peacefully picketing the premises of the EMPRESS HOTEL. Said Employer thereafter caused the arrest of said HAGEDORN for engaging in said peaceful concerted activity.

(g) On or about the 9th day of May 1955 the INTERNATIONAL COMPANY, INC. D/B/A EMPRESS HOTEL by its agent and employee, JOE LEE [fol. 40] KING, at the direction of its officers did physically and violently assault one, ROY MESSLER, a member of said HOTEL EMPLOYEES UNION LOCAL #255 while said MESSLER was peacefully picketing the premises of the EMPRESS HOTEL. Said employer thereafter caused the arrest of said MESSLER for engaging in said peaceful concerted activity.

(h) On or about the 12th day of May 1955 the INTERNATIONAL COMPANY, INC. D/B/A EMPRESS HOTEL by its agent and employee, JOE LEE KING, at the direction of its officers did physically and violently assault one, PRINCIPADO FELICIANO, a member of said HOTEL EMPLOYEES UNION LOCAL #255 while said FELICIANO was peacefully picketing the premises of the EMPRESS HOTEL. Said Employer thereafter caused the arrest of said FELICIANO for engaging in said peaceful concerted activity.

(i) On or about the 5th day of May, 1955, and thereafter the INTERNATIONAL COMPANY, INC., D/B/A EMPRESS HOTEL by its principal officer, ISIDORE KOWAL, did attempt to seriously injure employees engaged in peacefully picketing said EMPRESS HOTEL by having said KOWAL drive his Cadillac Sedan at a high rate of speed in and around said hotel in such a manner as to deliberately attempt to run down pickets peacefully exercising their rights.

IV

In furtherance of said conspiracy to interfere with, restrain and coerce employees in the exercise of their rights the Employer Association and the individual members thereof individually and in concert and conspiracy with each other by their officers, agents and employees have interrogated employees as to their membership in and activities for and on behalf of HOTEL EMPLOYEES

UNION LOCAL #255. The Employer Association has demanded that employees sign statements disclaiming membership in HOTEL EMPLOYEES UNION LOCAL #255 as a condition of continued employment and have [fol. 41] threatened to and have discharged and discriminated against employees who have refused to execute said statements. The Employer Member Hotels which have committed the aforementioned acts are:

ALLISON HOTEL
MARTINIQUE HOTEL, INC., D/B/A MARTINIQUE HOTEL
SEA ISLE, INC., D/B/A SEA ISLE HOTEL
SEACOMBER HOTEL
SURFCOMBER HOTEL
SHORE CLUB HOTEL

In furtherance of said conspiracy said Employer Hotels have committed the following acts of discrimination:

(a) On June 25th, 1955, the ALLISON HOTEL by its officers, agents and employees discharged KATHERINE VELLER because of her refusal to sign the aforementioned statements disclaiming membership in HOTEL EMPLOYEES UNION LOCAL #255.

(b) On June 5th, 1955, the MARTINIQUE HOTEL, INC., D/B/A MARTINIQUE HOTEL by its officers, agents and employees discharged KAY BUTLER because of her refusal to sign the aforementioned statements disclaiming membership in HOTEL EMPLOYEES UNION LOCAL #255.

(c) On June 27th, 1955, the MARTINIQUE HOTEL, INC., D/B/A MARTINIQUE HOTEL by its officers, agents and employees discharged LAWRENCE O'CONNOR because of her refusal to sign the aforementioned statements disclaiming membership in HOTEL EMPLOYEES UNION LOCAL #255.

V

In furtherance of said conspiracy to interfere with, restrain and coerce employees in the exercise of their rights

the Employer Association and the individual members thereof acting individually and in conspiracy with each other by their officers, agents and employees did on or about June 9, 1955, cause mass arrests of Employee Members of HOTEL EMPLOYEES UNION LOCAL #255 because said employees were engaged in peacefully picketing the premises of the employers. Said arrests were made [fol. 42] without cause or provocation by the Miami Beach Police Department on orders of its Police Chief.

Each of said employees arrested was forcibly taken to the Miami Beach Police Station and was required to post bond in the sum of $100.00. On trial said charges of loitering were determined to be unfounded and said acts of the said Association, the individual members thereof, and the Miami Beach Police Department did interfere with, restrain and coerce employees in the exercise of their rights.

VI

On or about March 3rd, 1955, and thereafter the Employer Association failed and refused to bargain or meet with and continues to refuse to bargain or meet with the representatives of said HOTEL EMPLOYEES UNION LOCAL #255 which has at all times represented a majority of the employees of the Employer Members of said Association. Repeated efforts on behalf of the representatives of HOTEL EMPLOYEES UNION LOCAL #255 to meet with the Employer Association representatives have been met with false, evasive and misleading representations by said Association.

In view of the said Association's refusal to bargain with HOTEL EMPLOYEES UNION LOCAL #255 said UNION requested bargaining from the individual Hotel Members of said Association. In furtherance of said conspiracy to refuse to bargain with said UNION, the employers hereinafter appearing, acting individually and in concert with each other and said Association, followed the identical pattern of: (1) Refusing to bargain and: (2) Immediately thereafter instituting Court Proceedings as set forth below:

(a) On or about the 1st day of April, 1955, SAX ENTERPRISES, INC., D/B/A the SAXONY HO-

TEL failed and refused to bargain with the HOTEL EMPLOYEES UNION LOCAL #255 and continues to refuse to bargain with said UNION although said UNION has at all times represented an overwhelming majority of the employees of said hotel.

On or about the 13th day of April, 1955, in protest [fol. 43] of said employer's unlawful refusal to bargain, an overwhelming majority of said employees engaged in concerted protected activity, to wit: striking and picketing at said hotel.

On or about the 15th day of April, 1955, the said SAXONY HOTEL in furtherance of a pre-determined plan, in concert and conspiracy with said Association and the Hotel-Members thereof to interfere with, coerce and restrain its employees, filed a false and misleading Complaint in the Circuit Court of Dade County, Florida, wherein said Employer requested said Court to enjoin and restrain, under threat of imprisonment and fine, the said concerted protected activity of the employees of the SAXONY HOTEL.

On or about the 11th day of May, 1955, the said Circuit Court refused to restrain said activity and said Employer in furtherance of said plan immediately thereafter petitioned the Supreme Court at Tallahassee, Florida, to restrain and enjoin said protected activity. On the 28th day of May, 1955, said Court did enter an order directing the said Circuit Court to restrain and enjoin said activity thereby restraining and coercing the employees in the exercise of their clear statutory rights. Said order remains in effect and continues to interfere with, restrain and coerce employees through threat of imprisonment and fine from the exercise of their rights under the Act.

(b) On or about the 1st day of April, 1955, and thereafter the BOCA RATON CLUB, INC., D/B/A BONEY PLAZA HOTEL; the LEEVLANS CORPORATION, D/B/A SANS SOUCI HOTEL; HARRY LEVY, ET AL, D/B/A SHERRY FRONTENAC HOTEL; the SORRENTO HOTEL CORPORATION, D/B/A SORRENTO HOTEL; the 2500 COLLINS

AVENUE CORPORATION, D/B/A ALGIERS HOTEL and MONTE CARLO, INC., D/B/A MONTE CARLO HOTEL, individually and in concert and conspiracy with each other, with said Association, and with all other members thereof individually and separately failed and refused and continue to fail and refuse to bargain or meet with said HOTEL EMPLOYEES UNION LOCAL #255 which UNION [fol. 44] was and is now the duly designated collective bargaining representative of an overwhelming majority of the employees of each respective hotel.

In protest of said individual unlawful refusal to bargain, the overwhelming majority of employees of each of the respective aforementioned hotels did, between the 13th day of April, 1955 and the 21st day of April, 1955, engage in concerted activity of striking and picketing of the respective hotels.

Thereupon said hotels in furtherance of a predetermined plan and in further interference with, restraint and coercion of its employees did file separate complaints in the Circuit Court of Dade County, Florida, which complaints were in essence identical to the complaint referred to in the above paragraph (a) and which sought to restrain and enjoin said concerted activity and picketing under threat of imprisonment and fines. On or about the 11th day of May, 1955, said Court refused to enjoin said individual picketing at said hotels and thereafter said employers in furtherance of said conspiracy individually and in concert did petition the Supreme Court of Florida to restrain and enjoin said concerted activity. On or about the 2nd day of June, 1955, said Honorable Supreme Court did enter an order enjoining said protected activity pending further determination by the said Circuit Court of matters within the purview of the Act.

On or about the 17th day of June, 1955, the said Circuit Court did make said determination in accordance with said order of the Supreme Court and thereupon dissolved the aforementioned order. Thereafter, said employers again, in furtherance of said con-

spiracy, did petition the Supreme Court of Florida for a stay of said dissolution which stay was granted by said Supreme Court on the 24th day of June, 1955, thereby further interfering with, restraining and coercing the employees of the respective employers under threat of imprisonment and fine in exercising their rights under the Act. The said order restraining and enjoining the concerted activity of the employees of [fol. 45] the aforementioned Hotels is still in full force and effect and continues to interfere with, restrain and coerce employees in the exercise of their rights under the Act.

(c) On or about the 1st day of April, 1955, and thereafter, the SEA ISLE HOTEL, INC., D/B/A THE SEA ISLE HOTEL failed and refused and continues to fail and refuse to bargain with the HOTEL EMPLOYEES UNION LOCAL #255, which UNION was then and is now the duly designated collective bargaining representative of an overwhelming majority of employees of said hotel.

On or about the 22nd day of April, 1955, in protest of the employer's unlawful refusal to bargain with said HOTEL EMPLOYEES UNION LOCAL #255, the overwhelming majority of said employees engaged in concerted protected activity, to wit: striking and picketing.

On or about the 25 day of April, 1955, the employer, in concert and conspiracy as set forth above, did file a complaint in the Circuit Court of Dade County seeking to restrain and enjoin said protected activity. On or about the 7th day of May, 1955, said Circuit Court did restrain and enjoin said protected activity thereby interfering with, restraining and coercing said employees in the exercise of their rights under the Act. Said order is still in full force and effect and continues to interefere with, restrain and coerce employees in the exercise of their rights. In further interference of the rights of employees said SEA ISLE HOTEL did, on or about the 14th day of May, 1955, file in said Court Motions for Orders to Show Cause why certain of said employees should not be held in con-

tempt of said Court by reason of having allegedly participated in said protected activity, thereby further interfering with, restraining and coercing employees as set forth above.

(d) On or about the 1st day of April, 1955, and thereafter, the CASABLANCA OPERATING CO., a partnership D/B/A CASABLANCA HOTEL, failed and refused and continues to fail and refuse to bargain with the HOTEL EMPLOYEES UNION LOCAL [fol. 46] #255 which UNION was then and is now the duly designated collective bargaining representative of an overwhelming majority of employees of said hotel.

On or about the 16th day of April, 1955, in protest of the employer's unlawful refusal to bargain with said HOTEL EMPLOYEES UNION LOCAL #255 the overwhelming majority of said employees engaged in concerted protected activity, to wit: striking and picketing.

On or about the 18th day of April, 1955, the employer in concert and conspiracy as set forth above did file a Complaint in the Circuit Court of Dade County seeking to restrain and enjoin said protected activity. On or about the 7th day of May, 1955, said Circuit Court did restrain and enjoin said protected activity thereby interfering with, restraining and coercing employees in the exercise of their rights under the Act. Said order is still in full force and effect and continues to interfere with, restrain and coerce employees in the exercise of their rights.

(e) On or about the 1st day of April, 1955, and thereafter the INTERNATIONAL COMPANY, INC., D/B/A EMPRESS HOTEL failed and refused and continues to fail and refuse to bargain with the HOTEL EMPLOYEES UNION LOCAL #255 which UNION was then and is now the duly designated collective bargaining representative of an overwhelming majority of employees of said hotel.

On or about the 2nd day of May, 1955, in protest of the employer's unlawful refusal to bargain with

said HOTEL EMPLOYEES UNION LOCAL #255 the overwhelming majority of said employees engaged in concerted protected activity to wit: striking and picketing.

(f) On or about the 17th day of May, 1955, and thereafter the HOTEL DELMONICO, INC., D/B/A DELMONICO HOTEL failed and refused and continues to fail and refuse to bargain with the HOTEL EMPLOYEES UNION LOCAL #255 which UNION was then and is now the duly designated collective bargaining representative of an overwhelming majority of employees of said hotel.

[fol. 47] On or about the 27th day of May, 1955, in protest of the employer's unlawful refusal to bargain with said HOTEL EMPLOYEES UNION LOCAL #255 said UNION engaged in concerted protected activity, to wit: picketing.

Thereafter the employer in concert and conspiracy as set forth above did file a Complaint in the Circuit Court of Dade County seeking to restrain and enjoin said protected activity. On or about the 16th day of June, 1955, said Circuit Court did restrain and enjoin said protected activity thereby interfering with, restraining and coercing employees in the exercise of their rights under the Act. Said order is still in full force and effect and continues to interfere with, restrain and coerce employees in the exercise of their rights.

(g) On or about the 12th day of April, 1955 and thereafter the DiLIDO HOTEL, INC., D/B/A DiLIDO HOTEL failed and refused and continues to fail and refuse to bargain with the HOTEL EMPLOYEES UNION LOCAL #255 which UNION was then and is now the duly designated collective bargaining representative of an overwhelming majority of employees of said hotel.

On or about the 4th day of May, 1955, in protest of the employer's unlawful refusal to bargain with said HOTEL EMPLOYEES UNION LOCAL #255 the overwhelming majority of said employees engaged

in concerted protected activity, to wit: striking and picketing.

On or about the 10th day of May, 1955 the employer in concert and conspiracy as set forth above did file a Complaint in the Circuit Court of Dade County seeking to restrain and enjoin said protected activity. On or about the 26th day of May, 1955, said Circuit Court did restrain and enjoin said protected activity thereby interfering with, restraining and coercing employees in the exercise of their rights under the Act. Said order is still in full force and effect and continues to interfere with, restrain and coerce employees in the exercise of their rights.

[fol. 48] (h) On or about the 3rd day of May, 1955 and thereafter, the STUYVESANT CORP., D/B/A LOMBARDY HOTEL failed and refused and continues to fail and refuse to bargain with the HOTEL EMPLOYEES UNION LOCAL #255 which UNION was then and is now the duly designated collective bargaining representative of an overwhelming majority of employees of said hotel.

On or about the 6th day of May, 1955, said hotel discharged three employees because of their activity on behalf of HOTEL EMPLOYEES UNION LOCAL #255.

On or about the 6th day of May, 1955, in protest of the employer's unlawful refusal to bargain with said HOTEL EMPLOYEES UNION LOCAL #255, and the discharge of said employees, the overwhelming majority of said employees engaged in concerted protected activity, to wit: striking and picketing.

On or about the 10th day of May, 1955, the employer in concert and conspiracy as set forth above did file a Complaint in the Circuit Court of Dade County seeking to restrain and enjoin said protected activity. On or about the 2nd day of June, 1955, said Circuit Court did restrain and enjoin said protected activity thereby interfering with, restraining and coercing employees in the exercise of their rights under the Act. Said order is still in full force and effect and continues

to interfere with, restrain and coerce employees in the exercise of their rights.

(i) On or about the 2nd day of June, 1955, and thereafter, the MARTINIQUE HOTEL, INC., D/B/A MARTINIQUE HOTEL failed and refused and continues to fail and refuse to bargain with the HOTEL EMPLOYEES UNION LOCAL #255 which UNION was then and is now the duly designated collective bargaining representative of an overwhelming majority of employees of said hotel.

On or about the 8th day of June, 1955, in protest of the employer's unlawful refusal to bargain with said HOTEL EMPLOYEES UNION LOCAL #255 said UNION engaged in concerted protected activity, to wit: picketing.

[fol. 49] On or about the 5th day of June, 1955, the employer in concert and conspiracy as set forth above did file a Complaint in the Circuit Court of Dade County seeking to restrain and enjoin said protected activity. On or about the 17th day of June, 1955, said Circuit Court did restrain and enjoin said protected activity thereby interfering with, restraining and coercing employees in the exercise of their rights under the Act. Said order is still in full force and effect and continues to interfere with, restrain and coerce employees in the exercise of their rights.

(j) On or about the 17th day of May, 1955, and thereafter, SOL COHEN ET AL, D/B/A PRESIDENT MADISON HOTEL failed and refused and continues to fail and refuse to bargain with the HOTEL EMPLOYEES UNION LOCAL #255 which UNION was then and is now the duly designated collective bargaining representative of an overwhelming majority of employees of said hotel.

On or about the 31st day of May, 1955, in protest of the employer's unlawful refusal to bargain with said HOTEL EMPLOYEES UNION LOCAL #255 said UNION engaged in concerted protected activity, to wit: striking and picketing.

On or about the 8th day of June, 1955, the employer in concert and conspiracy as set forth above did file a Complaint in the Circuit Court of Dade County seeking to restrain and enjoin said protected activity. On or about the 16th day of June, 1955, said Circuit Court did restrain and enjoin said protected activity thereby interfering with, restraining and coercing employees in the exercise of their rights under the Act. Said order is still in full force and effect and continues to interfere with, restrain and coerce employees in the exercise of their rights.

(k) On or about the 20th day of May, 1955, and thereafter MORRIS LANSBURGH ET AL, D/B/A ROBERT RICHTER HOTEL failed and refused and continues to fail and refuse to bargain with the HOTEL EMPLOYEES UNION LOCAL #255 which UNION was then and is now the duly designated col-
[fol. 50] lective bargaining representative of an overwhelming majority of employees of said hotel.

On or about the 31st day of May, 1955, in protest of the employer's unlawful refusal to bargain with said HOTEL EMPLOYEES UNION LOCAL #255 and discriminatory discharge of employees as set forth below, said UNION engaged in concerted protected activity, to wit: picketing.

On or about the 9th day of June, 1955, the employer in Concert and conspiracy as set forth above did file a complaint in the Circuit Court of Dade County seeking to restrain and enjoin said protected activity. On or about the 16th day of June, 1955, said Circuit Court did restrain and enjoin said protected activity thereby interfering with, restraining and coercing employees in the exercise of their rights under the Act. Said order is still in full force and effect and continues to interfere with, restrain and coerce employees in the exercise of their rights.

(l) On or about the 8th day of June, 1955, and thereafter, THOMAS JEFFERSON, INC., D/B/A SAN MARINO HOTEL failed and refused and continues to fail and refuse to bargain with the HOTEL

EMPLOYEES UNION LOCAL #255 which UNION was then and is now the duly designated collective bargaining representative of an overwhelming majority of employees of said hotel.

On or about the 15th day of June, 1955, in protest of the employer's unlawful refusal to bargain with said HOTEL EMPLOYEES UNION LOCAL #255 said UNION engaged in concerted protected activity, to wit: picketing.

On or about the 17th day of June, 1955, the employer in concert and conspiracy as set forth above did file a Complaint in the Circuit Court of Dade County seeking to restrain and enjoin said protected activity. Said complaint is now pending before said Court, thereby continuing to restrain, coerce and interfere with employees in the exercise of their rights.

(m) On or about the 1st day of April, 1955, and [fol. 51] thereafter R. S. LEVY ET AL, D/B/A VERSAILLES HOTEL failed and refused and continues to fail and refuse to bargain with the HOTEL EMPLOYEES UNION LOCAL #255 which UNION was then and is now the duly designated collective bargaining representative of an overwhelming majority of employees of said hotel.

On or about the 11th day of June, 1955, in protest of the employer's unlawful refusal to bargain with said HOTEL EMPLOYEES UNION LOCAL #255 said UNION engaged in concerted protected activity, to wit: picketing.

Thereafter the employer in concert and conspiracy as set forth above did file a complaint in the Circuit Court of Dade County seeking to restrain and enjoin said protected activity. Said complaint is now pending before said Court thereby continuing to restrain, coerce and interfere with employees in the exercise of their rights.

By the above acts and other acts the Employer Association and the individual members thereof, acting individually and in concert and conspiracy with each other, have flagrantly and deliberately interfered with, restrained

and coerced their employees, and have failed and refused to bargain with the duly designated collective bargaining representative of said employees, all in violation of the Labor Management Relations Act, as amended, and in particular Sections 8(a)(1)(3) and (5);

* * * * * * *

In United States District Court

Motion of Plaintiffs for Summary Judgment in Their Favor—Filed January 8, 1957

Come now the plaintiffs, by their attorneys, and move that summary judgment for plaintiffs be granted herein on the basis of the complaint and all other documents filed in this cause.

Wherefore, it is respectfully requested that the relief requested in plaintiffs' Complaint be granted.

Attorneys for Plaintiffs
Brown & Gettler, /s/ Ben Guth, 1505 Fountain Square Bldg., Cincinnati 2, Ohio.
[fol. 52] John E. McCarty, 812 Fifteenth St., N. W., Washington, D. C.

Affidavit in Support of Motion—Filed January 8, 1957

State of Ohio,
County of Hamilton, ss.:

J. W. Brown, being duly cautioned and sworn, deposes and states that he is and has been at all times material herein the General Counsel of the Hotel & Restaurant Employees and Bartenders International Union and that as such he is familiar with the proceedings involving the National Labor Relations Board, the Miami Beach Hotel Owners Association, Inc., and the Vanderbilt Hotel, which occurred on and after April 6, 1949.

Affiant further states that an unfair labor practice charge was filed by Local 133 of said International Union; that said charge was investigated; that as a result thereof

a complaint was issued against the aforementioned employers and that as a result thereof Stipulations and Settlement Agreements were entered into between the appropriate officers of the National Labor Relations Board and each of said employers; and that a copy of each of said Stipulations and Settlement Agreements is attached hereto and made a part hereof.

Further affiant saith naught.

/s/ J. W. Brown

[fol. 53]

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD
TENTH REGION

Case No. 10-CA-577

In the Matter of

VANDERBILT HOTEL CORPORATION, MIAMI BEACH HOTEL OWNERS ASSOCIATION, INC. AND SAMUEL KAPLAN, An Individual,

and

HOTEL & RESTAURANT EMPLOYEES' AND BARTENDERS' UNION, LOCAL #133.

STIPULATION

It is hereby stipulated and agreed by and between Miami Beach Hotel Owners Association, Inc., (herein called Respondent Association), by Alexander S. Gordon, its Attorney; Samuel Kaplan, an individual (herein called respondent Kaplan), by Alexander S. Gordon, his Attorney; Hotel & Restaurant Employees' and Bartenders' Union, Local #133, by Clyde Foster, its Secretary-Treasurer, and Frank E. Hamilton, Jr., and George L. Weasler, Counsel for the General Counsel, National Labor Relations Board, Tenth Region, that:

I

Upon a Fourth Amended Charge in Case No. 10-CA577, filed by Hotel & Restaurant Employees' & Bartenders' Union, Local #133 (herein called the Union), the General Counsel of the National Labor Relations Board, acting on behalf of the National Labor Relations Board (herein called the Board), and pursuant to Section 10 (b) of the National Labor Relations Act, 61 Stat. 136 (herein called the Act), has caused the Regional Director for the Tenth Region as agent for the Board, designated by the Board's Rules and Regulations, Series 5, as amended, Section 203.15, to issue its Complaint and Notice of Hearing thereon dated the 6th day of April, 1949, against Vanderbilt Hotel Corporation, Miami Beach Hotel Owners Association and Samuel Kaplan, an individual (herein collectively called the respondent).

On or about April 7, 1949, the Fourth Amended Charge, [fol. 54] Complaint, and Notice of Hearing, were duly served by registered mail on all parties hereto, and the receipt and service of the same are hereby acknowledged.

II

Respondent, the Miami Beach Hotel Owners Association, Inc., is, and has been at all times material herein, a nonprofit corporation duly organized under and existing by virtue of the laws of the State of Florida, composed of a substantial number of Miami Beach, Florida hotel owners, maintaining its principal office and place of business at Miami Beach, Florida where it is now and has been at all times material herein engaged in representing, promoting and further advancing the individual and collective business interests of its members.

III

Respondent Kaplan is, and at all times material herein has been, Executive Director of Respondent Association.

IV

For the purpose of this case only, Respondent Miami Beach Hotel Owners Association, Inc., and Respondent

Kaplan admit that Respondent Vanderbilt Hotel Corporation, herein called Respondent Hotel is engaged in interstate commerce within the meaning of the Act, and is subject to the jurisdiction of the Board. Neither this admission nor anything else in this stipulation shall prejudice or operate as a waiver of Respondent Miami Beach Hotel Owners Association, Inc. and Respondent Kaplan's right to contest jurisdiction in any other unfair labor practice charge or complaint.

V

Hotel & Restaurant Employees' and Bartenders' Union, Local #133, affiliated with the Hotel & Restaurant Employees' and Bartenders' International Union, AFL, is a labor organization within the meaning of Section 2 (S) of the Act.

VI

This stipulation, together with the Fourth Amended charge, complaint, notice of hearing thereon, and the stipulation entered into by and between Respondent Hotel, the Union and Counsel for the General Counsel, dated [fol. 55] April 14, 1949, may be filed with the Chief Trial Examiner of the Board at Washington, D. C. and when so filed shall constitute the entire record herein.

VII

The taking of testimony or the submission of further evidence, and the making of findings of fact and conclusions of law by the Board, pursuant to the provisions of the Act, are hereby expressly waived by the parties hereto, and the Board's Order as herein provided, shall have the same force and effect as if made after a full hearing, presentation of evidence, and the makings of findings thereon.

VIII

Upon this stipulation and the record herein set forth in paragraph VI above, the Board may enter and (sic) order providing as follows:

(a) Miami Beach Hotel Owners Association, Inc., its officers, agents, successors, and assigns and Samuel Kaplan, an individual, Respondents herein acting in the interest of Respondent Vanderbilt Hotel Corporation, or any other employer, shall:

1. Cease and desist from threatening to blacklist members of the Hotel & Restaurant Employees' and Bartenders' Union, Local #133, or any other labor organization, and to prevent them from finding or obtaining employment at other hotels in Miami Beach, Florida.

2. Cease and desist from in any other manner interfering with, restraining, or coercing the employees of the Vanderbilt Hotel Corporation, or of any other employer in the exercise of the rights to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act.

3. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Immediately send notices attached as "Appendix A" in writing, through the United States mails, to all its members as well as Vanderbilt Hotel Corporation and to all employees of Vanderbilt Hotel Corporation, stating [fol. 56] that it will not engage in the conduct from which it is ordered to cease and desist in paragraphs (a) 1, and (a) 2, of this order;

(b) Notify the Regional Director for the Tenth Region in writing within ten (10) days from the date the order is entered in this case of the steps the Respondents, Samuel Kaplan and Miami Beach Hotel Owners Association taken to comply herewith.

IX

It is agreed that upon application by the Board, the United States Court of Appeals for the Fifth Circuit, or any other appropriate United States Court of Appeals,

may enter its Decree, enforcing the Order of the Board hereinabove set forth, and all parties hereto expressly waive all rights and privileges to receive further notice of the filing of an application for the entry of such Decree or to contest the entry of such Decree, provided that a copy shall be served upon the Respondents after its entry.

X

The Respondents will comply with the provisions set forth in paragraph VIII (a) @, (sic) 2 and 3 (a) above, immediately upon approval of this Stipulation by the Board.

XI

This Stipulation is subject to the approval of the Board.

XII

This Stipulation contains the entire agreement of the parties and there is no agreement of any kind which waives, alters, or adds to this Stipulation.

In Witness Whereof the parties hereto have set their hands on the dates and at the places written opposite their names.

Dated this 15th day of April, 1949,
at Miami Beach, Florida.

By /s/ Alexandor S. Gordon, Its Attorney.

Dated this 15th day of April, 1949,
at Miami Beach, Florida.

[fol. 57] Samuel Kaplan, by /s/ Alexander S. Gordon, His Attorney.

Dated this 18th day of April, 1949,
at Miami, Florida.

Hotel & Restaurant Employees' and Bartenders' Union, Local #133, affiliated with Hotel & Restaurant Employees' and Bartenders' International Union, A. F. L., by /s/ Clyde Foster, Its Secretary-Treasurer.

Dated this 15th day of April, 1949,
at Miami Beach, Florida.

By /s/ Frank E. Hamilton, Jr., Counsel for the General Counsel, National Labor Relations Board, Tenth Region.

By /s/ George L. Weasler, Counsel for the General Counsel, National Labor Relations Board, Tenth Region.

Miami Beach Hotel Owners Ass'n.
1655 Drexel Avenue
Miami Beach, Fla.

"APPENDIX A"

Re: Vanderbilt Hotel Corporation, Miami Beach Hotel Owners Association, Inc., and Samuel Kaplan, an individual

and

Hotel & Restaurant Employees' and Bartenders' Union, Local #133

To All Members of the Miami Beach Hotel Owners Association, Inc., Miami Beach, Florida, and Employees of the Vanderbilt Hotel Corp.

Dear Sir:

Pursuant to a stipulation providing for a decree of the United States Court of Appeals enforcing a decision and [fol. 58] order of a National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Board, we hereby notify members of the Association that the Association, its officers, agents and Samuel Kaplan, will not threaten to blacklist members of the Hotel & Restaurant Employees' and Bartenders' Union, Local #133 or any other labor organization, or prevent them

from finding or obtaining employment at hotels in Miami Beach, Florida.

The Association, its officers and agents and Mr. Samuel Kaplan will not in any other manner interfere with, restrict or coerce the employees of the Vanderbilt Hotel Corporation or any other employer, in the exercise of the rights to self-organization to form, join or assist Labor organizations to bargain collectively with representatives of their choosing and to engage in concerted activity for the purpose of collective bargaining or other mutual aid and protection as guaranteed in section 7 of the Act.

Sincerely,

SAMUEL KAPLAN
Executive Secretary
Miami Beach Hotel Owners Ass'n.

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* * * * * * *

STIPULATION

It is hereby stipulated and agreed by and between Vanderbilt Hotel Corporation (herein called Respondent Hotel) by Morris Lansburgh; Hotel & Restaurant Employees' and Bartenders' Union, Local #133, by Clyde Foster, its Secretary-Treasurer, and Frank E. Hamilton, Jr., and George L. Weasler, Counsel for the General Counsel, National Labor Relations Board, Tenth Region, that:

1.

Upon a Fourth Amended Charge in Case No. 10-CA-577, filed by Hotel & Restaurant Employees' & Bartenders' Union, Local #133 (herein called the Union), the General Counsel of the National Labor Relations Board, acting on behalf of the National Labor Relations Board (herein [fol. 59] called the Board), and pursuant to Section 10 (b) of the National Labor Relations Act, 61 Stat. 136 (herein called the Act), has caused the Regional Director for the Tenth Region as agent for the Board, designated by the Board's Rules and Regulations, Series 5, as amended, Section 203.15, to issue its Complaint and Notice of Hear-

ing thereon dated the 6th day of April, 1949, against Vanderbilt Hotel Corporation, Miami Beach Hotel Owners Association and Samuel Kaplan, an individual (herein collectively called the respondent).

On or about April 7, 1949, the Fourth Amended Charge, Complaint, and Notice of Hearing, were duly served by registered mail on all parties hereto, and the receipt and service of the same are hereby acknowledged.

II.

Respondent Hotel, is, and at all times material herein has been, a corporation duly organized under the existing (sic) by virtue of the laws of the State of Florida, having its principal office and place of business located at Miami Beach, Florida (herein called the Miami Beach Hotel), where it is now and has been at all times material herein, engaged in providing hotel accomodations (sic) and services to customers for profit.

III.

Respondent Hotel in the course and conduct of its business operations at all times material herein, does and has done a total gross volume of business of approximately $500,000.00 annually, and engages in and causes, and has engaged in and caused, the following transactions which substantially affect foreign and interstate commerce:

(a) Providing hotel accomodations (sic) and services for a large number of customers, of whom more than 90 percent reside outside the State of Florida and travel on agencies engaged in foreign and interstate commerce from and through foreign countries and the states of the United States other than the State of Florida, to the Miami Beach Hotel, and more than 90 percent travel on agencies engaged in foreign and interstate commerce from the Miami Beach Hotel, to foreign countries and states of the United States other than the State of Florida;

[fol. 60] (b) Furnishing a part of its space and services to travel agencies, located outside the State of

Florida, which include the facilities and services of the Miami Beach Hotel as part of the total services furnished to their customers traveling in foreign and interstate commerce on tours organized and sponsored by the travel agencies;

(c) Purchasing supplies and equipment in substantial quantities, a large percentage of which originates outside the State of Florida, and is shipped in interstate commerce to the Miami Beach Hotel.

(d) Causing a substantial amount of advertising to be published and printed in newspapers and magazines which are published and distributed in states of the United States other than the State of Florida;

(e) Soliciting customers who reside in states of the United States other than the State of Florida by mailing circulars and advertisements to them from the Miami Beach Hotel;

(f) Mailing and shipping quantities of advertising matter to travel agencies located outside the State of Florida for distribution in states of the United States other than the State of Florida;

(g) Receiving for its customers substantial quantities of baggage and supplies which are shipped in foreign and interstate commerce to the Miami Beach Hotel;

(h) Leasing space in its buildings at Miami Beach, Florida to persons and corporations engaged in, or whose business operations substantially affect foreign and interstate commerce;

(i) Furnishing facilities for conventions and gatherings to corporations and persons who are engaged in, or whose business operations substantially affect foreign and interstate commerce, which are attended by persons who travel in foreign and interstate commerce to and from the Miami Beach Hotel;

(j) Receiving and sending telegraphic and telephonic communications in substantial quantities from and to persons outside the State of Florida, relative to the

availability of accomodations (sic) at the Miami Beach [fol. 61] Hotel, which are transmitted in foreign and interstate commerce from and to the Miami Beach Hotel.

IV.

For the purpose of this case only, the Respondent hotel admits that it is engaged in interstate commerce within the meaning of the Act, and is subject to the jurisdiction of the Board. Neither this admission nor anything else in this stipulation shall prejudice or operate as a waiver of the respondent hotel's right to contest jurisdiction in any other unfair labor practice charge or complaint.

V.

Hotel & Restaurant Employees' and Bartenders' Union, Local #133 affiliated with the Hotel & Restaurant Employees' and Bartenders' International Union, AFL, is a labor organization within the meaning of Section 2 (5) of the Act.

VI.

All employees of Respondent Hotel, including room clerks and employees of the engineering and maintenance departments, but excluding all house detectives, all office and clerical employees other than room clerks, and guards, professional employees and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.

VII.

On or about December 15, 1948, and at all times thereafter, a majority of the employees in the unit described in paragraph VI above designated and selected the Union as their representative for the purposes of collective bargaining with respondent Hotel. At all times since December 15, 1948, the Union has been the representative for the purposes of collective bargaining of a majority of

employees in the aforesaid unit and has, by virtue of Section 9 (a) of the Act, been the exclusive representative of all employees in the aforesaid unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment and other conditions of employment.

[fol. 62] VIII.

This Stipulation, together with the Fourth Amended Charge, Complaint, and Notice of Hearing thereon, may be filed with the Chief Trial Examiner in Washington, D. C. and when so filed shall constitute the entire record herein with respect to the allegations of the Complaint against Respondent Hotel, without prejudice however, to the General Counsel's proceeding with respect to all other allegations contained in the Complaint and not specifically covered by this Stipulation.

IX.

The taking of testimony or the submission of further evidence and the making of findings of fact and conclusions of law by the Board, pursuant to the provisions of the Act, are hereby expressly waived by the parties hereto, except as qualified in Paragraph VIII and the Board's Order as herein provided, shall have the same force and effect as if made after a full hearing, presentation of evidence, and the making of findings thereon.

X.

Upon this Stipulation and the record herein set forth in paragraph IX above, and without any further notice or proceedings herein, the Board may enter an Order providing as follows:

A. Vanderbilt Hotel Corporation, Miami Beach, Florida, its officers, agents, successors and assigns shall:

1. Cease and desist from:

(a) Urging, pursuading, (sic) threatening and warning its employees to refrain from assisting, becoming members of, or remaining members of the Union;

(b) Interrogating its employees, concerning their union membership, activities, sympathies and desires;

(c) Threatening to close or curtail its business operations before bargaining with the Union;

(d) Offering its employees better wages, hours and working conditions on condition that they withdraw from or refrain from joining or assisting the Union;

[fol. 63] (e) Threatening to discharge all employees who should become members of or assist the Union;

(f) Threatening to blacklist members of the Union, and to prevent them from finding or obtaining employment at other hotels in Miami Beach, Florida;

(g) Bargaining with individual employees concerning rates or pay, wages, hours of employment, or other conditions of employment, to the exclusion of the exclusive bargaining representative;

(h) Discouraging membership in Hotel & Restaurant Employees' and Bartenders' Union, A. F. L. or any other labor organization of its employees by discharging or refusing to reinstate any of its employees, or by discriminating in any other manner in regard to their hire or tenure of employment or any term or condition of their employment;

(i) Refusing to bargain collectively with Hotel & Restaurant Employees' and Bartenders' Union, Local #133, affiliated with Hotel & Restaurant Employees' and Bartenders' International Union, A. F. L., as the exclusive representative of all employees of the Miami Beach Hotel, including room clerks and employees of the engineering and maintenance department, but excluding all

house detectives, all office and clerical employees other than room clerks and guards, professional employees and supervisors as defined in the Act, with respect to rates of pay, wages, hours of employment and other conditions of employment;

(j) In any other manner interfering with, restraining or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist Hotel & Restaurant Employees' and Bartenders' Union, Local #133, affiliated with the Hotel & Restau- [fol. 64] rant Employees' and Bartenders' International Union, A. F. L., or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid and protection as guaranteed in Section 7 of the Act.

2. Take the following affirmative action to effectuate the policies of the Act:

(a) Upon request, bargain collectively with Hotel & Restaurant Employees' and Bartenders' Union, Local #133, affiliated with Hotel & Restaurant Employees' and Bartenders' International Union, A. F. L., as the exclusive representative of all employees of the Miami Beach Hotel, including room clerks and employees of the engineering and maintenance department, but excluding all house detectives, all office and clerical employees other than room clerks and guards, professional employees and supervisors as defined in the Act, with respect to rates of pay, wages, hours of employment, and other conditions of employment and, if an understanding is reached, embody such understanding in a signed statement;

(b) Place Milton Stern upon a preferential hiring list without prejudice to his seniority or other rights and privileges and make him whole for any loss of pay he may have suffered by reason

of the Respondent Hotel's discrimination against him by payment to him the sum of $270.00.

(c) Post at the Respondent's Miami Beach Hotel copies of the notice attached hereto and marked "Appendix A". Copies of said notice, to be furnished by the Regional Director for the Tenth Region (Atlanta, Georgia), shall, after being duly signed by the respondent hotel's represen-
[fol. 65] tative, be posted by the respondent hotel's immediately upon receipt thereof and maintained by them for sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the respondent hotel to insure that said notices are not altered, defaced, or covered by any other material;

(d) Notify the Regional Director for the Tenth Region in writing within ten (10) days from the date of this Order what steps the respondent has taken to comply herewith.

XI.

It is agreed that upon application by the Board, the United States Court of Appeals for the Fifth Circuit, or any other appropriate United States Court of Appeals, may enter its Decree, enforcing the Order of the Board hereinabove set forth, and all parties hereto expressly waive all rights and privileges to receive further notice of the filing of an application for the entry of such Decree or to contest the entry of such Decree, provided that a copy shall be served upon the respondent hotel after its entry.

XII.

The respondent hotel will comply with the provisions set forth in paragraph X (1) and (2) above, immediately upon approval of this Stipulation by the Board.

XIII.

This Stipulation is subject to the approval of the Board.

XIV.

This Stipulation contains the entire agreement of the parties and there is no agreement of any kind which waives, alters, or adds to this Stipulation.

In Witness Whereof the parties hereto have set their hands on the dates and at the places written opposite their names.

[fol. 66] Dated this 14th day of April, 1949,
at Miami, Florida.

Vanderbilt Hotel Corporation, by /s/ Morris Lansburgh.

Dated this 14th day of April, 1949,
at Miami, Fla.

Hotel & Restaurant Employees' and Bartenders' Union, Local #133, affiliated with Hotel & Restaurant Employees' and Bartenders' International Union, A. F. L., by /s/ Clyde Foster, Its Secretary-Treasurer.

Dated this 14th day of April, 1949,
at Miami, Fla.

By /s/ George L. Weasler, Counsel for the General Counsel, National Labor Relations Board, Tenth Region, /s/ Frank E. Hamilton, Counsel for the General Counsel, National Labor Relations Board, Tenth Region.

"APPENDIX A"

NOTICE TO ALL EMPLOYEES PURSUANT TO

A Stipulation providing for a Decree of the United States Court of Appeals, enforcing a Decision and Order of the National Labor Relations Board, and in order to effectuate

the policies of the National Labor Relations Act, we hereby notify our employees that:

WE WILL NOT discourage membership in the Hotel & Restaurant Employees' and Bartenders' Union, Local #133, or any other labor organization by discriminating in regard to their hire or tenure of employment or any other term or condition of their employment.

WE WILL NOT urge, persuade, threaten and warn our [fol. 67] employees to refrain from assisting, becoming members of, or remaining members of Hotel & Restaurant Employees' and Bartenders' Union, Local #133, affiliated with Hotel & Restaurant Employees' and Bartenders' International Union, A. F. L., or any other labor organization.

WE WILL NOT interrogate our employees concerning their Union membership, activities, sympathies and desires.

WE WILL NOT threaten to close down or curtail our business operations before bargaining with Hotel & Restaurant Employees' and Bartenders' Union, Local #133.

WE WILL NOT offer our employees better wages, hours and working conditions on condition that they withdraw from or refrain from joining or assisting Hotel & Restaurant Employees' and Bartenders' Union, Local #133.

WE WILL NOT threaten to discharge all employees who become members of or assist Hotel & Restaurant Employees' Union, Local #133, or any other labor organization.

WE WILL NOT threaten to blacklist members of Hotel & Restaurant Employees' Union, Local #133 or to prevent them from finding or obtaining employment at other hotels in Miami Beach, Florida.

WE WILL NOT bargain with individual employees concerning rates of pay, wages, hours of employment

or other conditions of employment to the exclusion of the exclusive bargaining agent.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form labor organizations, to join or assist Hotel & Restaurant Employees' and Bartenders' International Union, A. F. L., or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collect bargaining or other mutual aid or protection.

[fol. 68] WE WILL OFFER to Milton Stern immediate and full reinstatement to his former or substantially equivalent position without prejudice to his seniority or other rights and privileges, and make him whole for any loss of pay he may have suffered by reason of the discrimination against him by the payment to him of the sum of $.....

WE WILL BARGAIN collectively upon request with the above named Union as the exclusive representative of all employees in the bargaining unit described herein with respect to rates of pay, wages, hours of employment and other conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All employees of Vanderbilt Hotel Corporation, including room clerks and employees of the engineering and maintenance departments, but excluding all house detectives, all office and clerical employees other than room clerks, guards, professional employees and supervisors as defined in the Act.

All of our employees are free to become or remain members of the above-named Union or any other labor organization. We will not discriminate in regard to hire or tenure of employment or any term or condition of em-

ployment against any employee because of membership in, or activity on behalf of, any such labor organization.

Dated .....

VANDERBILT HOTEL CORPORATION

By .....
(Representative)

THIS NOTICE MUST REMAIN POSTED FOR 60 DAYS FROM DATE HEREOF AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY OTHER MATERIAL.

[fol. 69]

IN UNITED STATES DISTRICT COURT

MEMORANDUM—January 8, 1957

Morris, J. Plaintiff Hotel Employees Local No. 255, hereinafter referred to as "Local No. 255," is an affiliate of plaintiff Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO, hereinafter referred to as the "International Union." On June 29, 1955, Local 255 filed a petition for representation on behalf of a group of employees of the Miami Beach Hotel Association (a trade association with a membership of more than 150 hotels in the Miami Beach, Florida, area), hereinafter referred to as the "Hotel Association," with the Tenth Regional Office of the National (sic) Relations Board, hereinafter referred to as the "Board," pursuant to the provisions of the National Labor Relations Act, as amended,[1] hereinafter referred to as the "Act," Section 9 (c).[2]

[1] 61 Stat. 136, 29 U. S. C. A., Secs. 151, *et seq.*

[2] Section 9, in relevant part, provides:

(c) (1) Whenever a petition shall have been filed in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative

The Regional Director, without a hearing, on July 1, 1955, entered an order of dismissal, stating:

> On October 26, 1954, the Board issued its Decision and Order in *The Virgin Isles Hotel, Inc.*, case (110 NLRB No. 65) supplementing its recently announced standards for the assertion of jurisdiction and reiterating its long standing policy not to exercise jurisdiction over the hotel industry. Consequently, it does not appear that further proceedings are warranted inasmuch as it will not effectuate the policies of the Act to assert jurisdiction in this case.

[fol. 70] Thereafter, at the request of Local 255, the Board reviewed the Regional Director's dismissal of the petition. Both Local 255 and the Hotel Association filed briefs and made oral arguments, and on August 26, 1955, the Board, one member dissenting, issued its decision, stating:

> * * * the Board has carefully considered the appeal filed in this case and decided to sustain the Regional Director's dismissal of the petition on the ground that it would not effectuate the policies of the Act to assert jurisdiction over hotels. Accordingly, the petition is dismissed.

A motion for reconsideration and a second motion for reconsideration were denied by the Board on October 10, 1955 and January 27, 1956, respectively. Meantime, on July 7, 1955, Local 255 had filed charges with the Regional Director of the Tenth Region, alleging that the Hotel Association and its individual members had engaged in unfair labor practices in violation of Section 8 (1), (3) and (5) of the Act, and on August 30, 1955 (four days after the Board's decision in the representation proceed-

---

defined in section 9 (a), * * * the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

ing), the Regional Director advised of his determination not to process the unfair labor practice charges, which action, on appeal, was sustained on October 14, 1955 by the General Counsel.

Asserting that the Board's decision is violative of their rights under Article I, Section 8, and the Fifth Amendment of the Constitution, and under the Act, plaintiffs seek a declaratory judgment to that effect and injunctive relief. The matter is now before the Court on motion of Defendants for dismissal, or in the alternative for summary judgment, and on motion of plaintiffs for summary judgment.

[fol. 71] The question of whether action, preliminary to unfair labor practice proceedings under Section 10 of the Act, plainly beyond the scope of statutory authority, whether by way of departure from statutory requirements or from those of due process of law, may be reviewed by the District Court in the exercise of its equity power has been decided for this jurisdiction in the case of *Farmer* v. *The United Electrical Workers,* 93 U. S. App. D. C. 178, 211 F. (2d) 36; see also *DePratter* v. *Farmer,* decided by our Court of Appeals February 2, 1956, *Fay* v. *Douds,* 172 F. (2d) 720 (2d Circuit), and *Leedom, et al.* v. *International Union of Mine, Mill and Smelter Workers,* S. Ct. No. 57, decided December 10, 1956. No case has been submitted nor located by the Court in which determination was made under the equity powers of the District Court requiring the Board to take jurisdiction as to any industry where the Board had determined otherwise.

The Board has consistently asserted jurisdiction over labor disputes in the hotel industry in the District of Columbia (and originally, but which it recently withdrew, in the Territories), where it may exercise plenary jurisdiction. And it has consistently declined to assert jurisdiction over hotels located in the States. Plaintiffs here complain because of the exclusion of the hotel industry, and because they were not accorded a hearing by the Regional Director.

Respecting the last mentioned complaint, I do not think plaintiffs were prejudiced by the lack of a hearing at the lower level. They were permitted to file briefs before

the Board when the matter was reviewed by it, and to make oral argument. In their argument they urged that the changes in the employer-employee relations in the hotel industry since the Board's consideration of the *St. Louis Hotel Association case*, 92 N. L. R. B. 1388, decided January 17, 1951 (wherein the International Union urged the Board to adhere to its precedent of declining to exercise jurisdiction), the present size of the industry, both as to number and income, and its impact upon commerce were such as to require the assertion of jurisdiction by the Board.

The question to be faced squarely by this Court, there-
[fol. 72] fore, is whether the Board has the discretionary power to decline jurisdiction over the hotel industry.

There can be little, if any, question that the Congress intended to lodge in the Board, rather than in the courts, a determination of what employer-employee relationships so affect interstate commerce as to require the exercise of the powers granted to the Board, *N. L. R. B.* v. *Stoller*, 207 F. (2d) 305, 307 (9th Circuit), certiorari denied, 347 U. S. 919, *Optical Workers' Union* v. *N. L. R. B.*, 227 F. (2d) 687, 691 (5th Circuit). Of course, such determination may not be arbitrary. Hence, the question resolves itself into whether or not the determination of the Board not to exercise its jurisdiction with respect to the hotel industry is or is not arbitrary and capricious.

The Board has, as heretofore stated, consistently taken the position since the enactment of the Taft-Hartley Act of 1947, and prior thereto, that the hotel industry, other than in the District of Columbia, and in certain instances in the Territories, does not have such impact on interstate commerce as to justify the exercise of the Board's power in view of the pressing demands upon the Board of other industries having greater impact upon interstate commerce. This established policy of the Board was not only well known and recognized in the industry, but also by organizations of employees, and was thoroughly approved by the International Union involved in the *St. Louis Hotel case, supra.* It is urged by the Board in the instant case that such established policy was also fully known to the Congress at the time of the enactment

of the Taft-Hartley Act. While I agree with the plaintiffs that it may not be considered as part of the legislative history of the Act, it surely has very considerable weight on the question of whether or not the Board's action is arbitrary and capricious that one of the co-authors of the Taft-Hartley Act, Senator Robert A. Taft, stated on the floor of the Senate on August 30, 1949:

> * * * The Taft-Hartley law did not change in any way the language providing for the jurisdiction of the Board, or the general definition of interstate commerce * * *. It was not my intention in 1947, nor do I believe it was the intention of other members of the [fol. 73] Committee on Labor and Public Welfare, to broaden or extend the jurisdiction of the Board in that respect. In fact, I feel very strongly that it should not be done. * * * A hotel performs its service within four walls. It ships nothing into commerce. It produces no goods for commerce. In my opinion the Act was never intended to cover the hotel industry. [Quoted from *St. Louis Hotel Association case, supra,* at p. 1390, citing Congressional Record, 81st Congress, First Session, pages 12,697 and 12,698.]

There is also judicial sanction for the exercise of such discretion as is here involved to be found in the case of *N. L. R. B.* v. *Townsend,* 185 F. (2d) 378 (9th Circuit), at 383:

> Providing the Board acts within its statutory and constitutional power it is not for the courts to say when that power should be exercised. Many factors such as lack of funds or the imminence of a more drastic disruption of commerce in another industry might dictate that in a particular case powers explicitly granted should not be exercised.

There is also recognition of such administrative discretion in the case of *United States* v. *Morton Salt Co.*, 338 U. S. 632, at 647-648, in which the Supreme Court stated:

> We know that unquestioned powers are sometimes unexercised from lack of funds, motives of expediency, or the competition of more immediately important concerns.

And subsequently, in *N. L. R. B.* v. *Denver Building and Construction Trades Council, et al.*, 341 U. S. 675, at 684, the Supreme Court stated:

> Even when the effect of activities on interstate commerce is sufficient to enable the Board to take jurisdiction of a complaint, the Board sometimes properly declines to do so, stating that the policies of the Act would not be effectuated by its assertion of jurisdiction in that case.

For the reasons stated, I cannot come to the conclusion that the action of the Board in the instant case was arbitrary or capricious and, therefore, defendants' motion for summary judgment will be granted, and plaintiffs' motion [fol. 74] for summary judgment will be denied.

Counsel will prepare an appropriate order to carry this decision into effect.

January 8, 1957.

/s/ Jas. W. Morris, Judge.

IN UNITED STATES DISTRICT COURT

ORDER DISMISSING COMPLAINT—January 16, 1957

This cause having been heard on October 19, 1956, on defendants' motion to dismiss the complaint or, in the alternative, for summary judgment in their favor, and on plaintiffs' cross-motion for summary judgment in their favor; and the Court, having heard argument, considered the memoranda submitted, and, being fully advised in the premises, issued its opinion on January 8, 1957 granting defendants' motion for summary judgment in their favor and denying plaintiffs' motion on the ground that the action of the Board in the case was not arbitrary or capricious, it is hereby

Ordered, Adjudged and Decreed that the complaint be, and it hereby is, dismissed.

/s/ James W. Morris, Judge, United States District Court.

January 16, 1957

In United States District Court

Notice of Appeal to Court of Appeals—

Filed February 25, 1957

Notice is hereby given that Hotel Employees Local No. 255, Hotel and Restaurant Employees and Bartenders International Union, and Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO, plaintiffs above named, hereby appeal to the Circuit Court of Ap-
[fol. 75] peals for the District of Columbia from the final order of this Court entered January 16, 1957, which order granted defendants' Motion for Summary Judgment, denied plaintiffs' Motion for Summary Judgment, and dismissed plaintiffs' complaint.

Brown and Gettler, by /s/ J. W. Brown, /s/ Ben Gettler, /s/ Jonas B. Katz, 1505 Fountain Square Bldg., Cincinnati 2, Ohio, DU 1-2121; /s/ John E. McCarty, 815 Fifteenth St., N. W., Washington, D. C., Attorneys for Appellants.

[fol. 152] [File endorsement omitted]

In the United States Court of Appeals
for the District of Columbia Circuit

No. 13,765

Hotel Employees Local No. 255, Hotel and Restaurant Employees and Bartenders International Union, and Hotel and Restaurant Employees and Bartenders International Union, A.F.L.-C.I.O., Appellants,

v.

Boyd Leedom, individually and as Chairman, National Labor Relations Board, et al., Appellees.

Appeal from the United States District Court
for the District of Columbia.

PER CURIAM OPINION—October 24, 1957

Mr. Ben Gettler, of the bar of the Supreme Court of Ohio, pro hac vice, by special leave of Court, with whom Mr. David E. Feller was on the brief, for appellants.

Mr. Arnold Ordman, Attorney, National Labor Relations Board, of the bar of the Supreme Court of Massachusetts, pro hac vice, by special leave of Court, with whom Messrs. Stephen Leonard, Associate General Counsel, National Labor Relations Board, Marcel Mallet-Prevost, Assistant General Counsel, National Labor Relations Board, and John E. Jay, Attorney, National Labor Relations Board, were on the brief, for appellees.

Before: Wilbur K. Miller, Fahy and Bastian, Circuit Judges.

[fol. 153] Per Curiam: We affirm on the opinion of District Judge Morris, 147 F.Supp. 306.

Affirmed.

FAHY, Circuit Judge, dissenting: I would reverse. It seems to me to be inconsistent with the terms of section 9(c) of the Labor Relations Act, as amended, and therefore to constitute unlawful action by the Board, for it to refuse to assume jurisdiction over any representation case involving any hotel, notwithstanding "a question of representation affecting commerce exists."[1] The Act says that the Board shall take jurisdiction of questions of representation affecting commerce. The verb "shall" was incorporated into section 9(c) by the Taft-Hartley Act in place of "may" in the older Wagner Act.[2] The language is also to be contrasted with that relating to unfair labor practice cases,[3] where the Board is not required to file a complaint but is "empowered" to do so.[4]

---

[1] 49 Stat. 453 (1935), as amended 29 U.S.C. § 159(c) (1952).

[2] See 29 U.S.C. § 159(c) (1946).

[3] Section 10 of the Act, 49 Stat. 453 (1935), as amended 29 U.S.C. § 160 (1952).

[4] Of the four labor cases on which the District Court below relied for its decision on this point, three, *NLRB* v. *Denver Bldg.*

[fol. 154] There is no intimation in the Act that the public[5] or employees or employers should be denied the benefits of the representation provisions simply because a hotel is involved. We need not decide whether the Board as a matter of discretion or policy can validly decline jurisdiction of some representation questions involving hotels, though commerce should be affected within the meaning of the Act. See *NLRB* v. *Denver Bldg. Council*, 341 U.S. 675.[6] For in the present case the refusal of the Board to go forward was on the basis of a decision to exclude all questions of representation involving hotels. I think this is inconsistent with *Office Employes* v. *NLRB*, 353 U.S. 313, in which the opinion was handed down after the present case was decided by our District Court.

Jurisdiction in the District Court to entertain the action I think is amply sustained by our decision in *Air Line Dispatchers Ass'n* v. *National Mediation Bd.*, 89 U.S. App. D.C. 24, 27, 189 F.2d 685, 688; see, also, *Leedom* v. *Kyne*, —— U.S. App. D.C. ——, —— F.2d ——, and cases cited.

Council, 341 U.S. 675; *NLRB* v. *Stoller*, 207 F.2d 305 (9th Cir.); *NLRB* v. *Townsend*, 185 F.2d 378 (9th Cir.), dealt with unfair labor practices. The fourth, *Optical Workers* v. *NLRB*, 227 F.2d 687 (5th Cir.), though a representation case, was a denial of jurisdiction by the Board "in that case," see note 6, *infra*, because of the small amount of interstate business done by the company involved. There was no declination of jurisdiction over an entire industry. In fact, in none of the cases relied upon below was there such a declination. The only case in which the Board's refusal to exercise jurisdiction over an entire industry has been reviewed is *Office Employes* v. *NLRB*, *infra*.

[5] The public character of the rights involved has been noted often by the Supreme Court. *National Licorice Co.* v. *NLRB*, 309 U.S. 350, 363, 364, 366; *NLRB* v. *Bradford Dyeing Ass'n*, 310 U.S. 318; *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U.S. 261, 265; *Consolidated Edison Co.* v. *NLRB*, 305 U.S. 197, 237; *NLRB* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U.S. 261, 265.

[6] It is of special note that the Supreme Court in *Office Employes* quoted the following sentence from *Denver Bldg. Council*, adding the emphasis:

> the Board sometimes properly declines to [assert jurisdiction] stating that the policies of the Act would not be effectuated by its assertion *in that case*.

353 U.S. at 318.

[fol. 155] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,765—October Term, 1957.
C. A. 134-56

HOTEL EMPLOYEES LOCAL NO. 255, HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION, AND HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION, A.F.L.-C.I.O., Appellants,

v.

BOYD LEEDOM, individually and as Chairman, National Labor Relations Board, et al., Appellees.

Appeal from the United States District Court
for the District of Columbia.

Before: Wilbur K. Miller, Fahy and Bastian, Circuit Judges.

JUDGMENT—October 24, 1957

This cause came on to be heard on the record from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof, It is ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

Dated: October 24, 1957

Per Curiam.

Separate dissenting opinion by Circuit Judge Fahy.

[fol. 158] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 159]

SUPREME COURT OF THE UNITED STATES

No. 662—October Term, 1957.

[Title omitted]

ORDER ALLOWING CERTIORARI—March 3, 1958

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

No. [redacted] 21

Office Supreme Court, U.S.
FILED
OCT 1 1958
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

HOTEL EMPLOYEES LOCAL NO. 255, HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION, ET AL.,

Petitioners,

v.

BOYD LEEDOM, individually and as Chairman, National Labor Relations Board, et al.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BROWN & GETTLER
J. W. Brown
Ben Gettler
Jonas B. Katz
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Cincinnati, Ohio
Attorneys for Petitioners

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Congressional Record, 84th Congress, 1st Session Vol. 101, Part 9, pp. 11,008; 11,636-39 21

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

HOTEL EMPLOYEES LOCAL NO. 255, HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION, ET AL.,

Petitioners,

v.

BOYD LEEDOM, individually and as Chairman, National Labor Relations Board, et al.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Hotel Employees Local No. 255 and Hotel and Restaurant Employees and Bartenders International Union pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above entitled case on October 24, 1957.

OPINIONS BELOW

The opinion of the United States District Court for the District of Columbia entered on the 8th day of January, 1957, is reprinted in the Appendix hereto (App. p. 27) and is reported at 147 F. Supp. 306. The opinion of the Court of Appeals affirming *per curiam* "on the opinion of the District Court" and the dissenting opinion of Judge Fahy are reprinted in the Appendix hereto (App. p. 25) and are reported at — US App. DC —; — F (2d) —.

JURISDICTION

The judgment and order of the Court of Appeals was entered on October 24, 1957. The jurisdiction of this Court to review the aforementioned judgment is invoked under 28 USC § 1254 (1).

The original jurisdiction of the District Court was invoked under 28 USC § 1331 in that the matter in controversy exceeded $3,000.00, exclusive of interest and costs and arose under the Constitution and laws of the United States; and also under 28 USC § 2201 to declare the rights and legal relations of the parties under the Labor Management Relations Act, 1947.

The jurisdiction of the Court of Appeals arose under 28 USC § 1291 and was an appeal from a final decision of the District Court of the District of Columbia.

The complaint alleged in substance as to jurisdiction that the decision and order of the National Labor Relations Board: (1) violated the constitutional guarantees of due process and equal protection under Amendment V of the Constitution; (2) was an unlawful assumption of legislative power in violation of Article I, Section 8 of the Constitution; (3) was in excess of statutory authority and especially the authority conferred by Section 9 (c) of the Labor Management Relations Act, 1947; and (4) was promulgated in violation of the Administrative Procedures Act. The complaint further alleged that the Plaintiff had exhausted its administrative remedies. (JA [Joint Appendix] 5, 6)

The original jurisdiction of the District Court was sustained on authority of *Leedom, et al.* v. *International Union of Mine, Mill and Smelter Workers,* 352 US 145, affirming 96 US App. DC 416; 226 F (2d) 780; ***Farmer*** v. *The United Electrical Workers,* 93 US App DC 178, 211 F (2d) 36 (1953); *DePratter* v. *Farmer,* 98 US App DC

74, 232 F (2d) 74 (1956); *Fay* v. *Douds*, 172 F (2d) 720, (CA-2, 1949; *Air Line Dispatchers Ass'n* v. *National Mediation Board*, 89 US App. DC 24, 27, 189 F. (2d) 685, 688 (1951), and *Leedom* v. *Kyne*, — US App DC —; — F (2d) — 1957); 26 LW 2143. (See App. pp. 26, 29, 30)

QUESTIONS PRESENTED

1. Whether the provisions of Section 9 (c) of the Labor Management Relations Act are mandatory?

2. Whether the National Labor Relations Board may, consistent with the applicable decision of this court, exclude an entire industry from the coverage of the Labor Management Relations Act regardless of that industry's impact on commerce?

3. Whether the National Labor Relations Board may, consistent with the Administrative Procedures Act and the requirements of the Fifth Amendment, establish jurisdictional rules without affording interested parties an opportunity to be heard?

STATUTES INVOLVED

The relevant portions of the Labor Management Relations Act, 1947, (Act of June 23, 1947, c. 120, 80th Cong., 1st Sess., 61 Stat. 136, 29 U.S.C. § 151, *et seq.*) provide as follows:

Sec. 2 * * *

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual, or

any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia, or any Territory of the United States and any State or other Territory, or between any foreign country, and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

Sec. 9.

(c) (1) Whenever a petition shall have been filed, in accordance with such regulation as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employee (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section (a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as

the bargaining representative, is no longer a representative as defined in section 9 (a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9 (a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

Sec. 10.

(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise; **Provided,** That the board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provisions of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

The relevant portions of the Administrative Procedures Act, (Act of June 11, 1946, ch. 324 § 2, 60 Stat. 237, 5 U.S.C. § 1001, *et seq.*) provide as follows:

Sec. 1001. Definitions. * * *

(c) Rule and rule making.

"Rule" means the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing upon any of the foregoing. "Rule making" means agency process for the formulation, amendment, or repeal of a rule.

Sec. 1003. Rule making.

Except to the extent that there is involved (1) any military, naval, or foreign affairs function of the United States or (2) any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts—

(a) Notice; publication and contents.

General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the

subjects and issues involved. Except where notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(b) Procedures.
After notice required by this section, the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner; and after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose. Where rules are required by statute to be made on the record after opportunity for an agency hearing, the requirements of sections 1006 and 1007 of this title shall apply in place of the provisions of this subsection.

(c) Time of publication or service of rules.
The required publication or service of any substantive rule (other than one granting or recognizing exemption or relieving restriction or interpretative rules and statements of policy) shall be made not less than thirty days prior to the effective date thereof except as otherwise provided by the agency upon good cause found and published with the rule.

(d) Petitions.
Every agency shall accord any interested persons the right to petition for the issuance, amendment, or repeal of a rule. (June 11, 1946, ch. 324, § 4, 60 Stat. 238).

INTRODUCTORY STATEMENT

This petition is a part of the same labor controversy presently pending before this court in cases Nos. 363 and 364 concerning the hotel industry in Miami and Miami Beach, Florida. In the instant case the petitioners endeavored to obtain a factual determination by the National Labor Relations Board as to their majority status as representative of the employees involved and also to obtain National Labor Relations Board intervention to prevent activities of the hotel employers in contravention of the Labor Management Relations Act, 1947. In cases Nos. 363 and 364 are set forth the results in the Florida Courts when the employees were frustrated in their peaceable attempts to secure recognition of their bargaining representative and resorted to strikes and picketing. In one of the instances referred to in case No. 363, the *San Marino* case, a representation election was ordered by the State Court. The results of that attempt are set forth on pages 13 and 14 and 17 of the petition for writ of certiorari in case No. 363.

STATEMENT OF THE CASE

This is a petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit to review a judgment and order of that Court dated October 24, 1957 affirming the judgment of the District Court granting respondents' motion for summary judg-

ment, overruling petitioners' motion for summary judgment, and dismissing the cause.

The facts involved herein, none of which are in dispute, are as follows:

Petitioner Hotel Employees Local No. 255 is a labor organization affiliated with petitioner Hotel and Restaurant Employees and Bartenders International Union. Both the Local and the International Union represent persons employed in the hotel industry.

Petitioner Local 255 at all times mentioned in the complaint represented a majority of the employees of the hotel members of the Miami Beach Hotel Association. Petitioner Local 255 sought to obtain recognition by these hotels and the Association as the collective-bargaining representative of said employees. The hotels and the Association refused and there were 22 separate strikes by said majority of employees for recognition. (JA 18e)

On June 29, 1955, a representation petition was filed with the National Labor Relations Board in accordance with Section 9 (c) of Labor Management Relations Act, 1947, and in accordance with the regulations prescribed by the Board. This proceeding was captioned *All Hotel Members of Miami Beach Hotel Association,* 10-RC-3135. The petition was dismissed on July 1, 1955, without investigation and without any determination as to whether there was a reasonable cause to believe that a question of representation affecting commerce existed. The dismissal by the Regional Director of the National Labor Relations Board was based solely on a "long standing policy not to exercise jurisdiction over the hotel industry." (JA 11) Petitioners appealed to the National Labor Relations Board requesting that Board to over-rule the Regional Director, to order him to investigate the representation petition, hold a hearing, and proceed to an election. Three of the five Board members refused this

request, stating that "The Board has decided to adhere to the long-established policy of not asserting jurisdiction over the hotel industry on the grounds set forth in *St. Louis Hotel Association*, 92 NLRB 1388" (JA 17). Board Member Murdock stated that he "would over-rule the Regional Director and direct that the case be sent to hearing and on the basis of a full record determine the impact of the operation of the employer herein on commerce" (JA 17). Board Chairman Guy Farmer stated that "he believed that the Board should give consideration after hearing to modifying its policy so as to take jurisdiction on a limited basis pursuant to appropriate standards."

Requests of petitioners for reconsideration were denied by the National Labor Relations Board on October 10, 1955, and January 27, 1956, respectively.

On July 7, 1955, during the pendency of the aforementioned representation proceedings, Local 255 filed unfair labor practice charges with the Regional Director of the Tenth Region alleging multitudinous violations of the Labor Management Relations Act (JA 21-26). These charges were held in abeyance until the decision of the Board in the representation matter at which time they were dismissed in conformity with the Board's policy on jurisdiction (complaint, par. 17 JA 4-5). An appeal from the dismissal of these charges was taken to the General Counsel who sustained the dismissal on the basis of the Board's aforementioned decision in the representation case, *All Hotel Members of Miami Beach Hotel Association*, 10-RC-3135 (complaint, pars. 18, 19, JA 5).

The hotel industry is the 7th largest industry in the United States, having a total annual business volume in 1954 of 7½ billion dollars. Over 500,000 persons are employed in the industry. It is an industry which is engaged in interstate commerce and it is an integral and necessary part of interstate transportation (JA 19).

The Miami Beach Hotel Association is a trade association having a membership of more than 150 hotels in the Miami Beach, Florida, area. The Association and its individual members are employers engaged in interstate commerce; their operations individually affect commerce; and a labor dispute with said Association or its members would tend to hinder and obstruct commerce and the free flow of commerce, all within the meaning of the Labor Management Relations Act, 1947 (complaint, par. 8, JA 2, 3).

Southern Florida has 2½ million visitors a year from out of the state, and a great majority of them are accommodated by the members of the Miami Beach Hotel Association. The Association member hotels, for the year ending September. 1954, received over $10! million for food and lodging furnished visitors to the State of Florida. The hotel business is by far the leading industry of southern Florida. It is an integral part of interstate transportation and, during the year ending September 1954, the airlines alone transported 1,200,000 tourists to the Greater Miami area. A substantial number of these tourists came to the Association member hotels under contracts arranged outside the State of Florida for "package tour vacations" providing a single rate for travel to Miami Beach, hotel accommodations, meals, and return travel (JA 18a-c).

The complaint in the U.S. District Court for District of Columbia prayed for a declaratory judgment that the Board may not withhold its processes and the benefits of the act on the sole grounds that hotels are involved; that the Board's order be set aside; that the Board be directed to investigate, hold a hearing, conduct an election and certify the results; and that the Board be enjoined from withholding its processes and facilities on the sole ground that hotels are involved.

The Board filed a motion to dismiss for lack of jurisdiction, or, in the alternative, for summary judgment in its favor. The Petitioners likewise moved for summary judgment in the District Court. Thus the commerce facts set forth above and alleged in the complaint and supporting affidavits were admitted.

The District Court refused to dismiss for lack of jurisdiction but granted the Board's alternative motion for summary judgment on the ground that the hotel policy was not arbitrary or capricious (App. p. 27). The order dismissing the complaint was entered on January 16, 1957 (App. p. 33).

The Court of Appeals for the District of Columbia Circuit, on appeal, affirmed the judgment of the District Court *per curiam* "on the basis of the opinion of the District Court." Judge Fahy dissenting, (App. pp. 25, 26) would have reversed the District Court, reasoning: (1) that Section 9 (c) of the Act was mandatory on the Board; (2) that the exclusion of the hotel industry as a class was contra to this Court's decision in *Office Employees* v. ***NLRB,*** **353** US 313.

The judgment and order of the Court affirming the District Court was entered on October 24, 1957. (App. p. 27)

REASONS FOR GRANTING THE WRIT

I

This case presents an important question of federal law which has not been, but should be, settled by this court; viz., whether the National Labor Relations Board may refuse to process representation petitions in accordance with the Labor Management Relations Act of 1947 when a question of representation affecting commerce exists.

This court has made it clear that state courts and state boards may not act as to labor relations matters affecting interstate commerce covered by the Labor Management Relations Act, 1947, even though the National Labor Relations Board has declined to exercise its jurisdiction.[1]

It was argued in those cases that such a holding by this court would result in creation of a "no man's land". To the extent, however, that the National Labor Relations Board asserts its jurisdiction, either voluntarily or by requirement of the Act, such a "no man's land" is eliminated. It is submitted that a decision as to the authority of the Board to refuse to assert jurisdiction is a necessary complement to *Guss*, *Fairlawn* and *Garmone*.

As to representation cases the National Labor Relations Board has refused to assert jurisdiction in arbitrarily determined categories, even though a question of representation affecting commerce exists. The question as to the existence of such authority in view of the mandatory language of Section 9 (c) of the Labor Management Relations Act, 1947, 61 Stat. 143, 29 USC § 159 (c) has never been presented to this court since the amendment of the National Labor Relations Act by the Labor Management Relations Act in 1947. We have researched this question diligently but we do not find that it has ever been determined in any federal court other than in the instant cause.

The relevant portions of said Section 9 (c) are as follows:

> "Whenever a petition shall have been filed in accordance with such regulations as may be prescribed by the Board * * * the Board *shall* investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists, *shall* provide for an appropriate hearing upon due notice.

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[1] *Guss* v. *Utah Labor Relation Board*, 353 US 1; *Amalgamated Meat Cutters* v. *Fairlawn Meats*, 353 US 20; *San Diego Building Trades Council* v. *Garmone*, 353 US 26.

> * * * If the Board finds upon the record of such hearing that such a question of representation exists it *shall* direct an election by secret ballot and *shall* certify the results thereof." (emphasis supplied)

In the instant case the Board has not denied that it "had reasonable cause to believe that a question of representation affecting commerce exists". In the courts below counsel for the Board admitted that the Board has statutory jurisdiction. Further, the allegations of the complaint are, in effect, admitted by the motion for summary judgment. Therefore, the following question is squarely presented herein: assuming that the Board has reasonable cause to believe that a question of representation affecting commerce exists, may it refuse to investigate such petition, refuse to provide for an appropriate hearing upon due notice, refuse to determine upon the record of such hearing whether such a question of representation exists, and, if it so determines, refuse to direct an election by secret ballot and refuse to certify the results thereof?

The interpretation of this same numbered Section as previously worded under the National Labor Relations Act, 1935, 49 Stat. 435, prior to its amendment in 1947, was before this court in *Inland Empire District Council, etc., et al* v. *Millis*, 325 US 697 (1945). The language of Section 9 (c) which was before this court in the *Millis* case stated as follows:

> "(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board *may* investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board *shall* provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under Section 10 or other-

> wise, and *may* take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives." (emphasis supplied)

This court held that the language "the Board shall provide for an appropriate hearing" in the above-quoted section was mandatory, but that the language "may take a secret ballot, or utilize any other suitable method to ascertain such representation" was discretionary.

Congress amended the National Labor Relations Act after the *Millis* decision. It will be noted that "may" was changed to "shall". It seems clear, therefore, that Congress intended the provisions of Section 9 (c) using the word "shall" as mandatory provisions.[2]

Judge Fahy, dissenting below, concurred in the foregoing argument as follows:

> "The Act says that the Board shall take jurisdiction of questions of representation affecting commerce. The verb "shall" was incorporated into Section 9 (c) by the Taft Hartley Act in place of "may" in the older Wagner Act. The language is also to be contrasted with that relating to unfair labor practice cases, where the Board is not required to file a complaint but is 'empowered' to do so."

The language of Section 10 (a) of the Act, 61 Stat. 146, 29 USC § 160 (a), the unfair labor practice provision referred to by Judge Fahy, reads in part as follows:

> "The Board is *empowered*, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce". (emphasis supplied).

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[2] The Board cited below *Senate Report 105, 80th Congress, First Session*, as an explanation of the present language of Section 9 (c). Those portions of the Report cited are inapposite as they deal only with the desire of Congress to permit employers and non-union employees alike to request certifications. The Report clearly evidences that the amendment to Section 9 (c) to include subsections (1), (A) and (B) specifically provided this right, but in no way mitigated the clear meaning of the mandatory language previously referred to.

Thus, when Congress intended the Board to have discretionary authority it so stated by using the specific language "empowered"; when it intended to impose a mandatory duty upon the Board it used "shall". Consistent with this language the cases relied on by the Board below in support of its alleged discretionary authority relate to unfair labor practices arising under the above-quoted Section 10 (a).

The Board argued below that a mandatory directive under Section 9 (c) and permissive authority under Section 10 (a) are inconsistent. However, in the absence of clear legislative history to the contrary, it must be assumed that the language referred to represents the intent of Congress. Further, there is no inconsistency. Congress quite properly might have decided that the Board should not have discretion to refuse to make a *factual* determination of bargaining status under Section 9 (c) in cases affecting commerce, but that in unfair labor practice cases the Board should have discretion to prosecute or not to prosecute.

Nothing in the legislative history of the Act shows an intent by Congress to grant the Board the power of determining whether or not labor relations of many thousands of employers and millions of employees are to be governed by federal law or to remain entirely ungoverned. Yet, this is the result which flows from the Board's assumed authority

If the Board is required to observe the clear mandate of the statute the "no man's land" presently thought to exist will be substantially reduced, at least to the extent that federal authority must provide for factual determinations of bargaining status.

II

The Circuit Court of Appeals for the District of Columbia in the instant cause has decided a federal question

in a way which is in conflict with the applicable decision of this court; viz., it decided that the National Labor Relations Board has the authority to exclude an entire industry, as an industry, from the coverage of the Labor Management Relations Act, 1947, regardless of that industry's impact on commerce. The decision of this court with which it conflicts is *Office Employees* v. *NLRB*, 353 US 313 (1957).

In *Office Employees* this court decided that the Board does not have the authority to exclude an entire class of employers. The language of this court's opinion is paraphrased in part in the succeeding paragraph to fit the facts of the instant ca

Here the Board has refused to assert jurisdiction over hotels as a class in the face of a clear expression of Congress as set forth in Section 2 (2) and 2 (6) that the Act should be applied to all employers who "affect commerce." While it is true that this court has sustained the Board's declination of jurisdiction in certain unfair labor practice cases because the policies of the Act may not have been effectuated "in that case"[3] it has never judicially approved the Board's renunciation of jurisdiction over an entire, and very important segment of American industrial life. The discretionary authority of the Board on a case by case basis to exclude employers whose business does not sufficiently "affect commerce" does not authorize the Board to assume Congress's authority to exclude all employers in a particular industry regardless of their impact on commerce. When Congress intended to make such exclusions it did so specifically.[4]

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[3] *NLRB* v. *Denver Building Trade*, 341 US 675.

[4] See section 2 (2) of the Act excluding persons subject to the Railway Labor Act, the United States or any governmental corporation, Federal Reserve Bank, state or political subdivision, nonprofit hospitals, etc.

The Court of Appeals in affirming *per curiam* on the basis of the opinion of the District Court, completely disregarded the holding in the *Office Employees* case, which was decided after the District Court opinion herein. As Judge Fahy, dissenting, stated below:

> "In the present case the refusal of the Board to go forward was on the basis of a decision to exclude all questions of representation involving hotels. I think this is inconsistent with *Office Employees* in which the opinion was handed down after the present case was decided by our District Court."

The Board argued before the Court of Appeals that *Office Employees* only stands for the proposition that, since labor organizations when acting as employers are specifically included within the definition of employers in Section 2 (2) of the Act, the Board could not exclude all labor organizations as a class from the Act. They argued that *Office Employees* does not prevent the Board from excluding other entire classes of employers who are not specifically named in Section 2 (2).

If this distinction is valid, then the Board may engraft any number of exceptions on the Act. In the instant case the uncontradicted record considered by the Court of Appeals reveals that the Board has chosen, for reasons known only to it, to exclude the 7th largest industry in the United States which by its nature is a vital link in the chain of commerce and which contains mammoth interstate corporations such as the Statler-Hilton and Sheraton chains and associations such as the Miami Beach Hotel Association. If it is empowered to exclude such an industry then the Board may, as its ideas change, likewise exclude the entire automobile industry, steel industry or electrical industry, etc. Such power is identical to the congressional power of repeal.

The question involved is not whether the Board will make such additional exclusions, but whether it is empowered to do so. In view of the significance of *Guss, Garmone and Fairlawn*, we submit that this Court should rule whether the Board does in fact have such legislative powers.

Further, in an analogous situation involving a portion of the construction industry the Seventh Circuit Court of Appeals reached a decision contrary to that reached by the District of Columbia Circuit herein and ordered the Board to proceed. *Joliet Contractors* v. *NLRB*, 193 F (2d) 833 (1952).

If it is assumed that employers as a class may not be excluded from the operation of the Act, is there any justification for an exception in the case of the hotel industry? The Board, quite correctly, has consistently recognized and conceded that hotels are not local in character and that their operations affect commerce within the meaning of the Act. All of the earliest Board decisions dealing with hotels contain specific findings that the employers do affect commerce.[5] Even in *In the Matter of Hotel Association of St. Louis*, 92 NLRB 1388 (1951) the Board, while basing its decision largely on precedent, recognized that the business of the employer was not local in nature.[6]

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[5] *In the Matter of Willard Hotel*, 2 NLRB 1094 (1937); *In the Matter of Raleigh Hotel Company*, 7 NLRB 353 (1938); *In the Matter of Hamilton Realty Corporation*, 10 NLRB 858 (1938); *In the Matter of Westchester Apartments, Inc.*, 17 NLRB 453 (1939); *Rutland Court Owners, Inc.* 44 NLRB 587 (1939); *Raleigh Hotel Co.*, 49 NLRB 777 (1943). Although the Board argues that these cases arose in the District of Columbia, the decisions make no such distinction.

[6] In the *St. Louis* case, the majority stated:

> "* * * the Board recently announced that it would utilize certain standards—many of them arithmetic—as a guide in determining whether or not to exercise jurisdiction where earlier precedent had sometimes appeared uncertain * * * Were we to judge this case by those standards alone jurisdiction should be exercised here."

Members Reynolds and Murdock, dissenting:

> "* * * on this record it cannot be gainsaid that the employer's operations have a substantial and important effect on interstate commerce. Indeed, our majority colleagues specifically reject the employer's contention that it is not engaged in commerce within the meaning of the Act."

In the instant case the Board likewise concedes jurisdiction,[7] and has not attempted to challenge those portions of the complaint alleging that the employer is engaged in commerce.

There is no legal justification for the alleged hotel policy. The Board, recognizing that the language of the statute covers all employers, except certain specified exceptions (of which hotels are not one), has attempted to derive its authority from a theory of "congressional approval of long established policy". Such a theory cannot be sustained.

There is no such long established policy. The birth of the hotel policy occurred in 1949, two years after the amendment of the Act, in *In the matter of White Sulphur Springs Co.*, 85 NLRB 1487. Research reveals that all previously reported decisions show an affirmative policy of asserting jurisdiction over hotels[8] and the Board has been unable to produce any decision or administrative announcement which indicates otherwise.[9] Thus the Board's reference to long established policy has no basis. In 1949 the Court of Appeals for the District of Columbia Circuit acknowledged:

> "Examination of the published indexes and digests of National Labor Relations Board decisions fails to reveal any other decision upon the policy of the Board in respect to its jurisdiction in the hotel industry, ex-

[7] The Board, in its brief below (p. 24) stated:
"* * * In the instant case (the decision) stems from a determination that, *though power exists* under all the circumstances, including the Board's limited resources, it would not effectuate the policies of the Board to exert it." (emphasis supplied).

[8] See footnote 5.

[9] The Board cited below the 1951 — 16th Annual Report of the National Labor Relations Board as evidence of long established policy. It is significant to note that no prior annual report makes any reference to any such policy.

cept in the matter of *Willard, Inc.*, 2 NLRB 1094, in which the Board exercised its jurisdiction".[10]

Any reference to reported decisions at the time of the enactment of the 1947 Act could lead only to the conclusion that the Board had an affirmative policy to assert jurisdiction over hotels. For that reason, Congressional affirmance of a contrary policy would be impossible, and the Board, although repeatedly challenged, has been unable to cite any pre-enactment statement of any Congressman, Senator or Committee which shows approval, or much less, even an awareness of the alleged Board policy.[11]

To accept the argument of Congressional approval under the circumstances set forth above would be to indulge in fanciful speculation. *Peters* v. *Hobby*, 349 U.S. 241.

III

The National Labor Relations Board in refusing its processes and the protection of the Labor Management Relations Act, 1947, has so far departed from the accepted and usual course of judicial proceedings, and the Court

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[10] *NLRB* v. *Eaneat*, 85 US App. DC 371; 179 F 2(d) 15, footnote 2. Judge Stevens dissenting stated at 179 F 2(d) 25:

"The statement of the Board in the *White Sulphur Springs* case that it has been its administrative policy adhered to since 1935 not to assert jurisdiction over the hotel industry overlooks the exercise of jurisdiction by the Board in the instant case. Moreover I think that the Board cannot properly, under the Act, have a general policy which would forbid the exercise of its jurisdiction in a particular case where, as in the instant case, commerce is involved and where, as found in the instant case, the activities of the employer have a substantial relation to commerce and tend to lead to labor disputes burdening and obstructing such commerce and the free flow thereof."

[11] The Board below has relied on a post-enactment statement of Senator Taft to buttress its assertion. That post-enactment statement cannot be deemed an expression of Congressional intent any more than the contrary opinions of five Senators expressed on the floor of the Senate on July 20th and 27th, 1955, Congressional Record, 84th Congress, 1st Session, Volume 101, Part 9, pp 11008, 11636-39.

of Appeals for the District of Columbia Circuit has so far sanctioned such a departure, as to call for an exercise of this court's power of supervision.

Since 1951, when the Board first established its general jurisdictional rules, it has never accorded employers, labor organizations or employees an opportunity to be heard as to the merits of those rules. The Board's present jurisdictional rules were announced in press releases or individual cases in which the facts were limited to the particular representation question involved. The decisions, however, affected thousands of employers and millions of employees other than the specific parties involved. The validity of this method of formulating jurisdictional rules or standards has not been passed on by this court and is subject to considerable doubt.

The jurisdictional decisions of the Board clearly implement, interpret and prescribe law or policy, have a future effect, and are of general and particular applicability. They are not interpretative guides, but absolute commands to Board agents. Accordingly, it is submitted that these jurisdictional standards are "rules" within Section 1 (c) of the Administrative Procedures Act, 60 Stat. 237, 5 USC, § 1001, et seq. There is no claim by the Board that any of its jurisdictional standards, including the exclusion of hotels, have been promulgated in compliance with the notice, hearing and publication requirements of that Act.

Even if we assume, however, that the Administrative Procedures Act does not apply then accepted judicial procedure and the rudiments of fair play and the due process clause require that parties affected by the formulation of jurisdictional standards be given an opportunity to be heard and to present evidence as to whether or not any particular proposed jurisdictional rule does in

fact effectuate the purposes of the Act. The early cases of this Court upholding the constitutionality of the Act clearly contemplated that jurisdictional issues would be determined on a case by case basis, affording parties an opportunity to be heard. *Consolidated Edison Co. of New York* v. *NLRB, et al.*, (1938) 305 US 197; *Santa Cruz Packing Co.* v. *NLRB*, (1938), 303 US 453.[12]

The history of the formulation of the instant hotel rule demonstrates the Board's disregard of due process. The Board's hotel policy was adopted in the matter of *White Sulphur Springs, Inc.* (1949) 85 NLRB 1487. The evidence in the *White Sulphur Springs* case was confined to the operation of the Greenbriar Hotel and the only parties to the proceeding were a small independent union of firemen and policemen and a subsidiary of the Chesapeake & Ohio Railroad. Yet the decision affected every hotel and every hotel employee in the United States. Again in the matter of *Hotel Association of St. Louis*, 92 NLRB 1388 (1951) the evidence was limited to the operation of that association. In the instant case the Board's decision was based solely upon policy without reference to facts.

Due process is not satisfied by such a procedure. Petitioners believe that Mr. Justice Frankfurter's comment contained in his concurring opinion in *Anti-Fascist Committee* v. *McGrath*, (1951) 341 US 123, at p. 165, is particularly apposite.

> "The construction placed by the Court upon legislation conferring administrative powers shows consistent respect for a requirement of fair procedure before men are denied or deprived of rights. From a great mass of cases running the full gamut of control

[12] The Court of Appeals below has recently recognized that parties adversely affected by an established standard are entitled to a hearing to determine the validity of its application to their particular case. *Amalgamated Association* v. *NLRB*, — US App. D.C. —, 238 F. (2d) 38 (1957); cf *Storer* v. *U.S.*, 95 US App. D. C. 176, 220 F. (2d) 204 (1955).

over property and liberty, there emerges the principles that statues should be interpreted, if explicit language does not preclude, so as to observe due process in its basic meaning."

We earnestly and respectfully submit that the National Labor Relations Board has shown no respect for the requirements of fair procedure and has violated the Fifth Amendment.

CONCLUSION

For the reasons above set forth, it is respectfully submitted that this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

OPINION OF UNITED STATES COURT OF APPEALS

(CAPTION)

PER CURIAM: We affirm on the opinion of District Judge Morris, 147 F.Supp. 306.

Affirmed

FAHY, *Circuit Judge, dissenting*: I would reverse. It seems to me to be inconsistent with the terms of section 9(c) of the Labor Relations Act, as amended, and therefore to constitute unlawful action by the Board, for it to refuse to assume jurisdiction over any representation case involving any hotel, notwithstanding "a question of representation affecting commerce exists."[1] The Act says that the Board shall take jurisdiction of questions of representation affecting commerce. The verb "shall" was incorporated into section 9(c) by the Taft-Hartley Act in place of "may" in the older Wagner Act.[2] The language is also to be contrasted with that relating to unfair labor practice cases,[3] where the Board is not required to file a complaint but is "empowered" to do so.[4]

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[1] 49 Stat. 453 (1935), as amended 29 U.S.C. § 159(c) (1952).

[2] See 29 U.S.C. § 159(c) (1946).

[3] Section 10 of the Act. 49 Stat. 453 (1935), as amended 29 U.S.C. § 160 (1952).

[4] Of the four labor cases on which the District Court below relied for its decision on this point, three, *NLRB* v. *Denver Bldg. Council*, 341 U.S. 675; *NLRB* v. *Stoller*, 207 F.2d 305 (9th Cir.); *NLRB* v. *Townsend*, 185 F.2d 378 (9th Cir.), dealt with unfair labor practices. The fourth, *Optical Workers* v. *NLRB*, 227 F.2d 687 (5th Cir.), though a representation case, was a denial of jurisdiction by the Board "in that case," see note 6, *infra*, because of the small amount of interstate business done by the company involved. There was no declination of jurisdiction over an entire industry. In fact, in none of the cases relied upon below was there such a declination. The only case in which the Board's refusal to exercise jurisdiction over an entire industry has been reviewed is *Office Employes* v. *NLRB*, *infra*.

There is no intimation in the Act that the public[5] or employees or employers should be denied the benefits of the representation provisions simply because a hotel is involved. We need not decide whether the Board as a matter of discretion or policy can validly decline jurisdiction of some representation questions involving hotels, though commerce should be affected within the meaning of the Act. See *NLRB* v. *Denver Bldg. Council*, 341 U.S. 675.[6] For in the present case the refusal of the Board to go forward was on the basis of a decision to exclude all questions of representation involving hotels. I think this is inconsistent with *Office Employes* v. *NLRB*, 353 U.S. 313, in which the opinion was handed down after the present case was decided by our District Court.

Jurisdiction in the District Court to entertain the action I think is amply sustained by our decision in *Air Line Dispatchers Ass'n* v. *National Mediation Bd.*, 89 U.S. App. D.C. 24, 27, 189 F.2d 685, 688; see, also, *Leedom* v. *Kyne*, —— U.S. App. D.C. ——, —— F.2d ——, and cases cited.

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[5] The public character of the rights involved has been noted often by the Supreme Court. *National Licorice Co.* v. *NLRB*, 309 U.S. 350, 363, 364, 366; *NLRB* v. *Bradford Dyeing Ass'n*, 310 U.S. 318; *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U.S. 261, 265; *Consolidated Edison Co.* v. *NLRB*, 305 U.S. 197, 237; *NLRB* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U.S. 261, 265.

[6] It is of special note that the Supreme Court in *Office Employes* quoted the following sentence from *Denver Bldg. Council*, adding the emphasis:

> the Board sometimes properly declines to [assert jurisdiction] stating that the policies of the Act would not be effectuated by its assertion *in that case*.

353 U.S. at 318.

JUDGMENT OF UNITED STATES COURT OF APPEALS

(CAPTION)

This cause came on to be heard on the record from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

Dated: Oct. 24, 1957.

Per Curiam.

Separate dissenting opinion by Circuit Judge Fahy.

OPINION OF UNITED STATES DISTRICT COURT

(CAPTION)

MEMORANDUM

Morris, J. Plaintiff Hotel Employees Local No. 255, hereinafter referred to as "Local No. 255," is an affiliate of plaintiff Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO, hereinafter referred to as the "International Union." On June 29, 1955, Local 255 filed a petition for representation on behalf of a group of employees of the Miami Beach Hotel Association (a trade association with a membership of more than 150 hotels in the Miami Beach, Florida, area), hereinafter referred to as the "Hotel Association," with the Tenth Regional Office of the National Relations Board, hereinafter referred to as

the "Board," pursuant to the provisions of the National Labor Relations Act, as amended,[1] hereinafter referred to as the "Act," Section 9 (c).[2]

The Regional Director, without a hearing, on July 1, 1955, entered an order of dismissal, stating:

> On October 26, 1954, the Board issued its Decision and Order in *The Virgin Isles Hotel, Inc.*, case (110 NLRB No. 65) supplementing its recently announced standards for the assertion of jurisdiction and reiterating its long standing policy not to exercise jurisdiction over the hotel industry. Consequently, it does not appear that further proceedings are warranted inasmuch as it will not effectuate the policies of the Act to assert jurisdiction in this case.

Thereafter, at the request of Local 255, the Board reviewed the Regional Director's dismissal of the petition. Both Local 255 and the Hotel Association filed briefs and made oral arguments, and on August 26, 1955, the Board, one member dissenting, issued its decision, stating:

> * * * the Board has carefully considered the appeal filed in this case and decided to sustain the Regional Director's dismissal of the petition on the ground that

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[1] 61 Stat. 136, 29 U.S.C.A., Secs. 151, *et seq.*

[2] Section 9, in relevant part, provides:
(c) (1) Whenever a petition shall have been filed in accordance with such regulations as may be prescribed by the Board —
(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9 (a), * * * * * * *
the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

it would not effectuate the policies of the Act to assert jurisdiction over hotels. Accordingly, the petition is dismissed.

A motion for reconsideration and a second motion for reconsideration were denied by the Board on October 10, 1955 and January 27, 1956, respectively. Meantime, on July 7, 1955, Local 255 had filed charges with the Regional Director of the Tenth Region, alleging that the Hotel Association and its individual members had engaged in unfair labor practices in violation of Section 8 (1), (3) and (5) of the Act, and on August 30, 1955 (four days after the Board's decision in the representation proceeding), the Regional Director advised of his determination not to process the unfair labor practice charges, which action, on appeal, was sustained on October 14, 1955 by the General Counsel.

Asserting that the Board's decision is violative of their rights under Article I, Section 8, and the Fifth Amendment of the Constitution, and under the Act, plaintiffs seek a declaratory judgment to that effect and injunctive relief. The matter is now before the Court on motion of Defendants for dismissal, or in the alternative for summary judgment, and on motion of plaintiffs for summary judgment.

The question of whether action, preliminary to unfair labor practice proceedings under Section 10 of the Act, plainly beyond the scope of statutory authority, whether by way of departure from statutory requirements or from those of due process of law, may be reviewed by the District Court in the exercise of its equity power has been decided for this jurisdiction in the case of *Farmer* v. *The United Electrical Workers*, 93 U.S. App. D.C. 178, 211 F. (2d) 36; see also *DePratter* v. *Farmer*, decided by our Court of Appeals February 2, 1956, *Fay* v. *Douds*, 172 F. (2d) 720 (2d

Circuit), and *Leedom, et al.* v. *International Union of Mine, Mill and Smelter Workers*, S. Ct. No. 57, decided December 10, 1956. No case has been submitted nor located by the Court in which determination was made under the equity powers of the District Court requiring the Board to take jurisdiction as to any industry where the Board had determined otherwise.

The Board has consistently asserted jurisdiction over labor disputes in the hotel industry in the District of Columbia (and originally, but which it recently withdrew, in the Territories), where it may exercise plenary jurisdiction. And it has consistently declined to assert jurisdiction over hotels located in the States. Plaintiffs here complain because of the exclusion of the hotel industry, and because they were not accorded a hearing by the Regional Director.

Respecting the last mentioned complaint, I do not think plaintiffs were prejudiced by the lack of a hearing at the lower level. They were permitted to file briefs before the Board when the matter was reviewed by it, and to make oral argument. In their argument they urged that the changes in the employer-employee relations in the hotel industry since the Board's consideration of the *St. Louis Hotel Association case*, 92 NLRB 1388, decided January 17, 1951 (wherein the International Union urged the Board to adhere to its precedent of declining to exercise jurisdiction), the present size of the industry, both as to number and income, and its impact upon commerce were such as to require the assertion of jurisdiction by the Board.

The question to be faced squarely by this Court, therefore, is whether the Board has the discretionary power to decline jurisdiction over the hotel industry.

There can be little, if any question that the Congress intended to lodge in the Board, rather than in the courts, a determination of what employer-employee relationships

so affect interstate commerce as to require the exercise of the powers granted to the Board, *N.L.R.B.* v. *Stoller,* 207 F. (2d) 305, 307 (9th Circuit), certiorari denied, 347 U.S. 919, *Optical Workers' Union* v. *N.L.R.B.*, 227 F. (2d) 687, 691 (5th Circuit). Of course, such determination may not be arbitrary. Hence, the question resolves itself into whether or not the determination of the Board not to exercise its jurisdiction with respect to the hotel industry is or is not arbitrary and capricious.

The Board has, as heretofore stated, consistently taken the position since the enactment of the Taft-Hartley Act of 1947, and prior thereto, that the hotel industry, other than in the District of Columbia, and in certain instances in the Territories, does not have such impact on interstate commerce as to justify the exercise of the Board's power in view of the pressing demands upon the Board of other industries having greater impact upon interstate commerce. This established policy of the Board was not only well known and recognized in the industry, but also by organizations of employees, and was thoroughly approved by the International Union involved in the *St. Louis Hotel case, supra.* It is urged by the Board in the instant case that such established policy was also fully known to the Congress at the time of the enactment of the Taft-Hartley Act. While I agree with the plaintiffs that it may not be considered as part of the legislative history of the Act, it surely has very considerable weight on the question of whether or not the Board's action is arbitrary and capricious that one of the co-authors of the Taft-Hartley Act, Senator Robert A. Taft, stated on the floor of the Senate on August 30, 1949:

> * * * The Taft-Hartley law did not change in any way the language providing for the jurisdiction of the Board, or the general definition of interstate commerce * * *. It was not my intention in 1947, nor

> do I believe it was the intention of other members of the Committee on Labor and Public Welfare, to broaden or extend the jurisdiction of the Board in that respect. In fact, I feel very strongly that it should not be done. * * * A hotel performs its service within four walls. It ships nothing into commerce. It produces no goods for commerce. In my opinion the Act was never intended to cover the hotel industry. (Quoted from *St. Louis Hotel Association case, supra*, at p. 1390, citing Congressional Record, 81st Congress, First Session, pages 12,697 and 12,698.)

There is also judicial sanction for the exercise of such discretion as is here involved to be found in the case of *N.L.R.B.* v. *Townsend*, 185 F. (2d) 378 (9th Circuit), at 383:

> Providing the Board acts within its statutory and constitutional power it is not for the courts to say when that power should be exercised. Many factors such as lack of funds or the imminence of a more drastic disruption of commerce in another industry might dictate that in a particular case powers explicitly granted should not be exercised.

There is also recognition of such administrative discretion in the case of *United States* v. *Morton Salt Co.*, 338 U.S. 632, at 647-648, in which the Supreme Court stated:

> We know that unquestioned powers are sometimes unexercised from lack of funds, motives of expediency, or the competition of more immediately important concerns.

And subsequently, in *N.L.R.B.* v. *Denver Building and Construction Trades Council, et al.*, 341 U.S. 675, at 684, the Supreme Court stated:

> Even when the effect of activities on interstate commerce is sufficient to enable the Board to take jurisdiction of a complaint, the Board sometimes prop-

erly declines to do so, stating that the policies of the Act would not be effectuated by its assertion of jurisdiction in that case.

For the reasons stated, I cannot come to the conclusion that the action of the Board in the instant case was arbitrary or capricious and, therefore, defendants' motion for summary judgment will be granted, and plaintiffs' motion for summary judgment will be denied.

Counsel will prepare an appropriate order to carry this decision into effect.

/s/ Jas. W. Morris
Judge

January 8, 1957.

(Filed Jan. 16, 1957)

ORDER OF UNITED STATES DISTRICT COURT

(CAPTION)

This cause having been heard on October 19, 1956, on defendants' motion to dismiss the complaint or, in the alternative, for summary judgment in their favor, and on plaintiffs' cross-motion for summary judgment in their favor; and the Court, having heard argument, considered the memoranda submitted, and, being fully advised in the premises, issued its opinion on January 8, 1957 granting defendants' motion for summary judgment in their favor and denying plaintiffs' motion on the ground that the action of the Board in the case was not arbitrary or capricious, it is hereby

ORDERED, ADJUDGED AND DECREED that the complaint bs, and it hereby is, dismissed.

/s/ James W. Morris
Judge, United States District Court

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CHARLES E. WYZANSKI, Clerk

No. 31

In the Supreme Court of the United States

October Term, 1938

HOTEL EMPLOYEES LOCAL NO. 209, HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION, ET AL., PETITIONERS

v.

BOYD LEON, INDIVIDUALLY AND AS CHAIRMAN OF THE NATIONAL LABOR RELATIONS BOARD, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 21

HOTEL EMPLOYEES LOCAL NO. 255, HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS' INTERNATIONAL UNION, ET AL., PETITIONERS

v.

BOYD LEEDOM, INDIVIDUALLY AND AS CHAIRMAN, NATIONAL LABOR RELATIONS BOARD, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the district court (R. 80–85) is reported at 147 F. Supp. 306. The opinion of the court of appeals (R. 86–88) is reported at 249 F. 2d 506.

JURISDICTION

The judgment of the court of appeals (R. 89) was entered on October 24, 1957. The petition for writ of certiorari was filed on December 13, 1957, and granted on March 3, 1958 (R. 90; 355 U. S. 951). The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

The National Labor Relations Board dismissed a representation petition, filed under § 9 (c) of the National Labor Relations Act, as amended, on the ground that it would not effectuate the policies of the Act to assert jurisdiction over cases involving employer-employee relations in the hotel industry. The questions presented are:

1. Whether a federal district court has jurisdiction under its equity powers to review such a determination.

2. Whether the Board's determination was a valid exercise of its discretionary power to decline jurisdiction.

3. Whether the Board's action in this case satisfied the requirements of the Administrative Procedure Act and of due process.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151, *et seq.*), and of the Administrative Procedure Act (60 Stat. 237, 5 U. S. C. 1001, *et seq.*) are reprinted in the Appendix to petitioners' brief, pp. 28–33.

STATEMENT

On June 29, 1955, Local 255 filed a representation petition under § 9 (c) of the Act with the Board's Regional Director for the Tenth Region (R. 4). In that petition Local 255 requested certification as bargaining representative of the employees of the hotels comprising the Miami Beach Hotel Association, a trade association of hotels in the Miami Beach,

Florida, area (R. 3–4). On July 1, 1955, the Board's Regional Director, after affording Local 255 an opportunity voluntarily to withdraw its petition, entered an order of dismissal stating in relevant part (R. 5, 13):

> On October 26, 1954, the Board issued its Decision and Order in the *Virgin Isles Hotel, Inc.*, case (110 N. L. R. B. No. 65 [p. 558]) supplementing its recently announced standards for the assertion of jurisdiction and reiterating its "long-standing policy not to exercise jurisdiction over the hotel industry." Consequently, it does not appear that further proceedings are warranted inasmuch as it will not effectuate the policies of the Act to assert jurisdiction in this case.

The local requested and was granted review of the order by the Board. (R. 11–12). Briefs were submitted and oral argument was heard on August 9, 1955 (*ibid.*). On August 26, 1955, the Board, one member dissenting, sustained the Regional Director's dismissal, stating that it had "decided to adhere to the long-established policy of not asserting jurisdiction over the hotel industry * * *" (R. 18).[1] Motions for reconsideration filed on September 9, 1955, and on January 27, 1956, were denied (R. 5, 12).[2]

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[1] Guy Farmer, then chairman of the Board, concurred in the Board's disposition of the case but suggested that the Board consider modifying its policy so as to take jurisdiction over hotels on a limited basis pursuant to appropriate standards (R. 19). Member Murdock dissented on the grounds he had previously stated in *Hotel Ass'n of St. Louis*, 92 N. L. R. B. 1388 (R. 18).

[2] On July 7, 1955, the petitioners had filed with the Regional Director unfair labor practice charges against the employers.

On January 12, 1956, Local 255 and its parent International, petitioners herein, instituted the present action in the United States District Court for the District of Columbia (R. 2). The gravamen of their complaint was that the Board, in dismissing the representation petition filed by Local 255, "deprived the plaintiffs and their members of their right to participate in elections and other proceedings before the National Labor Relations Board * * * and of their constitutional and statutory right to organize and represent employees in the hotel industry" (R. 8). Petitioners sought a declaratory judgment and injunctive relief to compel the Board to process the representation petition and to enjoin the Board from withholding its processes "on the sole ground that it does not effectuate the policies of the Act to assert jurisdiction over hotels" (R. 9).

The Board members, respondents herein, moved to dismiss the complaint or, in the alternative, for summary judgment in their favor on the ground that the District Court lacked jurisdiction of the subject matter of the action and on the further ground that, in any event, the complaint failed to state a claim warranting relief (R. 10). Petitioners filed a cross-motion for summary relief in their favor (R. 62).

After the Board's decision dismissing the representation petition, the Regional Counsel refused to issue a complaint. On October 14, 1955, the General Counsel sustained that ruling. Although petitioners recite those facts in their complaint (R. 6), they did not join the General Counsel as a defendant or seek relief from his action. That action, accordingly, is not in issue in this proceeding.

The district court granted summary judgment for the respondents. Although asserting its jurisdiction to enjoin action by the Board "plainly beyond the scope of statutory authority, whether by way of departure from statutory requirements or from those of due process of law" (R. 82), the court found that petitioners had not been deprived of any constitutional rights, that the determination whether to assert its jurisdiction was within the Board's discretion, and that the Board's action was not arbitrary or capricious (R. 80–85). The court of appeals, one judge dissenting, affirmed on the opinion of the district court (R. 87–88).

SUMMARY OF ARGUMENT

1. Petitioners, invoking the general equity jurisdiction of the district court, seek injunctive and declaratory relief requiring the Board to hear and determine their representation petition. In effect, they seek judicial review, in the district court, of the Board's dismissal of those proceedings. In § 9 (d) of the Act, however, Congress expressly provided that certification proceedings might be reviewed by the courts of appeals whenever the facts certified become the basis for a final order in an unfair labor practice proceeding. For reasons more fully set out in our brief in *Leedom* v. *Kyne*, No. 14, this Term, now pending before the Court, this specification of a method of review in one instance would seem clearly to have been intended to preclude review in others. Moreover, since none of the primary rights protected by the Act, nor the duty of the employer to bargain

with the representative of a majority of its employees, depends upon prior certification, it was not unreasonable for Congress to preclude judicial review of dismissals of representation proceedings.

Alternatively, if the district courts have any jurisdiction to review representation proceedings, it extends only to action by the Board plainly in excess of statutory authority or which infringes constitutional rights. For the district courts to go further than that and inquire into the merits of the Board's action on matters clearly within the area of its discretionary powers would deprive the statutory scheme of review of all significance.

2. Assuming, however, that the district court had jurisdiction, its decision upholding the Board's action was correct.

a. Although the Board's powers extend to the full scope of the commerce power, the Board has been forced, by lack of funds, to concentrate its efforts in those areas in which the need for its intervention to prevent obstructions to commerce is greatest and to decline jurisdiction in areas where the impact upon commerce is less substantial. The Board's power to decline jurisdiction over unfair labor practice proceedings on that ground is settled. *NLRB* v. *Denver Building & Construction Trades Council,* 341 U. S. 675, 684. Such a power is a necessary inference from the purposes of the Act as a whole and the nature of the duties imposed upon the Board, for without it the Board could not effectively perform its functions in any area. As this Court has recognized, "unquestioned powers are sometimes unexercised from

lack of funds, motives of expediency, or the competition of more immediately important concerns." *United States* v. *Morton Salt Co.*, 338 U. S. 632, 647–648.

There is no reason to distinguish between the Board's power to decline jurisdiction in unfair labor practice proceedings under § 10 and its power to do so in certification proceedings under § 9 (c). To the contrary, since the primary purpose of certification is to lay the foundation for subsequent unfair labor practice proceedings, it would seem unreasonable to require the Board to take jurisdiction in one case when it would not in the other. Nor is the fact that § 9 (c) provides that the Board "shall" investigate representation petitions, while § 10 only "empowers" the Board to prevent unfair labor practices, a controlling difference. First, since the power to decline jurisdiction in unfair labor practice proceedings does not depend exclusively on the particular wording of § 10, the absence of similar language in § 9 (c) is not controlling. Second, the word "shall" was first introduced into the section by the 1947 amendments, and a comparison of the revised section with the old section shows that the purpose of the new language was simply to spell out the power of the Board, not explicit in the old section, to make a preliminary investigation before holding a hearing. That is, the change was concerned only with the procedure followed in cases over which the Board has taken jurisdiction, not with its right to decline jurisdiction altogether. Third, in all of the extensive legislative history of the 1947 Act there is no suggestion of a purpose to change

the Board's jurisdictional powers, and it is inconceivable that Congress would have so drastically increased the duties of the Board without comment. Finally, the power to limit the number of representation proceedings before the Board is obviously just as essential to the effective enforcement of the Act as is the power to limit unfair labor practice proceedings. The conclusion seems unavoidable that the Board may apply the same jurisdictional standards to both kinds of proceedings.

b. The conclusion of the Board that the hotel business is essentially "local" in character and does not have a sufficient impact upon commerce as to justify the diversion of the Board's limited resources from more pressing matters was not an abuse of its discretion.

The scope of judicial review of administrative action necessarily depends upon the degree of objectivity of the standards to be applied. The determination of how the Board's limited enforcement capacities can best be utilized to further the purposes of the Act requires a policy judgment so generalized and so broad in scope that only the most limited judicial review would seem to be appropriate. Only where it is shown that the Board has acted on the basis of an isolated criterion which is found to be not relevant to the purposes of the Act or contrary to expressed congressional intent, as was the case in *Office Employes* v. *NLRB,* 353 U. S. 313, would it seem possible to say that the Board has exceeded the bounds of its necessarily wide discretion. Since no such showing has been made here, that should end the matter. Never-

theless it is worthwhile to point out some of the considerations which support the Board's conclusion. First, the hotel business has an indisputably "local" flavor: "A hotel performs its service within four walls. It ships nothing into commerce. It produces no goods for commerce." 95 Cong. Rec. 12471 (Senator Taft). Second, small units predominate in the industry, only 6% of the 25,000 hotels having had receipts in excess of $300,000 in 1954. Third, the Board has consistently declined to assert jurisdiction over the hotel industry since the beginning of the Wagner Act and that policy has, by and large, been strongly supported by both labor (including, until this case, the petitioners) and management. Adherence to precedent, no less than accommodation to changing circumstances, is an important desideratum in asserting jurisdiction. Fourth, there has been a relative absence of major labor disputes in the hotel industry, demonstrating the less pressing need for the Board's intervention in that area than in others. And finally, not only has Congress, though aware of the Board's policy, not seen fit to change it, but Congressmen directly concerned with overseeing the Board's operations have expressly approved of it. The obvious relevance of these considerations should answer any claim that the Board's policy is without a rational basis.

c. Petitioner's claim that the denial of an opportunity to present evidence on the Florida hotel industry's impact on commerce deprived them of due process of law is without substance. Both in briefs and in oral argument before the Board they presented

complete data on the industry. Since the Board accepted the asserted facts as true, though finding them inadequate to justify a departure from its policy, there was no occasion to require petitioners to prove them.

Petitioners' contention that the Board's jurisdictional decisions did not comply with the "rule-making" procedures of the Administrative Procedure Act is irrelevant, since no one contends that those precedents have the force of "rules." The Board may properly evolve policy by precedent and is not required to proceed by rule-making. *Securities & Exchange Commission* v. *Chenery Corp.*, 332 U. S. 194, 201–203.

ARGUMENT

I

THE DISTRICT COURT WAS WITHOUT JURISDICTION TO REVIEW THE BOARD'S DISMISSAL OF THE REPRESENTATION PETITION

This action was not brought under any special statutory provision providing for judicial review of Board action in representation proceedings. Rather, petitioners instituted an independent action in the district court invoking the court's general equity jurisdiction under 28 U. S. C. 1331 (federal question jurisdiction), 28 U. S. C. 2201 (Declaratory Judgment Act), and § 10 of the Administrative Procedure Act, 60 Stat. 237, 5 U. S. C. 1009. They sought injunctive and declaratory relief requiring the Board to entertain and process their representation petition. We contend that Congress has provided an exclusive method for review of Board action and foreclosed

resort to independent proceedings. Alternatively, we argue that the district court's jurisdiction, if any, is limited to review of constitutional questions and questions of statutory power.

1. In our brief in *Leedom* v. *Kyne,* No. 14, this Term, we show in detail that, in §§ 9 (d) and 10 of the National Labor Relations Act, Congress has provided for the exclusive method of review of Board proceedings, thereby removing such cases from the jurisdiction of the district courts. We respectfully refer the Court to that brief for an elaboration of that argument and will do no more here than outline its statutory basis.

Sections 10 (e) and (f) of the Act provide for direct review by the courts of appeal of final orders of the Board entered in unfair labor practice proceeding. In addition, § 9 (d) of the Act provides that, whenever an order in an unfair labor practice proceeding is based in part upon the facts certified in a previous representation proceeding, review of the representation proceeding may be had upon review of the order in the unfair labor practice proceeding. No other provisions are made for review of representation proceedings. From this detailed prescription of how and when representation proceedings might be reviewed the inference seems inescapable that Congress intended that to be the exclusive method of review. Congress, having chosen the courts of appeals as the appropriate forum for whatever review it expressly authorized of Board orders, could hardly have intended to splinter the review jurisdiction by leaving an unmentioned and

undefined area of jurisdiction in the district courts to review other orders. "All constitutional questions aside, it is for Congress to determine how the rights which it creates shall be enforced. * * * In such a case the specification of one remedy normally excludes another." *Switchmen's Union* v. *National Mediation Board,* 320 U. S. 297, 301 (holding that district courts have no jurisdiction to review certification proceedings under the Railway Labor Act notwithstanding the absence of any other method of review).

Nor are the consequences of the Board's dismissal of a representation proceeding so substantial as to make it unreasonable to infer that Congress intended to preclude judicial review of that action. The primary purpose of certification is to determine whether the union represents a majority of the employees in an appropriate unit and thus to make clear the duty of the employer to bargain with it—subject, of course, to the employer's right to refuse to bargain and to challenge the certification under § 9 (d) in an unfair labor practice proceeding. However, a union representing a majority of the employees is entitled to recognition whether or not it has been certified, and the employer's refusal to bargain with it is equally an unfair labor practice. Apart from the fact that the underlying facts (majority status, appropriateness of the unit, etc.) have to be proved in the unfair labor practice proceeding itself rather than in a prior certification proceeding, the only difference would seem to be that, without a prior certification, the employer might have available a defense that he believed in

good faith that the union did not represent a majority of the employees.

The fact that certification is neither the source of the duty to bargain nor, under § 9 (d), conclusive as to its existence does not, of course, mean that it is of no value. It is undoubtedly of significant practical importance to the parties in enabling them to determine their respective rights and duties with greater certainty, and, for that reason, the provision of an administrative procedure to make such declaratory findings seems fully appropriate. We suggest, however, that the denial of access to such a procedure does not affect such substantial rights as to make it unreasonable for Congress to preclude judicial review.

The only other consequences of certification of which we are aware are quite incidental to its main purpose. Thus, if the union has been certified, (a) the ban on "secondary" strikes to force its recognition is inapplicable (§§ 8 (b) (4) (B), 303 (a) (2)), (b) the ban on strikes to require the employer to assign particular work to the craft represented by the union, if required by the certification, is inapplicable (§§ 8 (b) (4) (D), 303 (a) (4)); and (c) a rival union is barred from striking for recognition (§§ 8 (b) (4) (C), 303 (a) (3)). That is, the certified union, in order to enforce the certification, is relieved of certain prohibitions on self-help otherwise applicable, and the employer, in recognizing the certified union, is protected from the conflicting claims of rival unions. To that extent certification does confer on

the union advantages that it would not otherwise have. But the dismissal of its representation petition would seem hardly to affect such basic rights as to have made it inappropriate for Congress not to provide judicial relief. Indeed, so remote and insubstantial is the injury resulting from such action [3] that it may be questioned whether the extraordinary remedy sought here—essentially equivalent to mandamus to require the Board to act—would be justified even in the absence of a purpose of Congress to provide an exclusive method of review.[4]

2. Even if the district courts' jurisdiction to review representation proceedings has not been completely foreclosed by the Act, they have at most been left with the very limited function of preventing the Board from acting "plainly beyond the scope of its statutory authority" or in violation of the Constitution, and have no power to set aside Board action

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[3] The allegations of "irreparable injury" in the complaint are entirely conclusory (R. 8), so the only injuries involved here are those that can be inferred as a necessary consequence from the terms of the Act. The complaint does not allege threatened strikes by rival unions, the existence of jurisdictional disputes, or that § 8 (b) (4) (B) has foreclosed "secondary" support otherwise forthcoming.

[4] This question is, of course, quite different from that in *American Communications Ass'n* v. *Douds*, 339 U. S. 382, whether certification was merely a "privilege" not entitled to protection against an allegedly unconstitutional deprivation (for failure to file non-communist affidavits). The injury in that case was also quite different, since the union was complaining of a threatened certification of another union, which, under § 8 (b) (4) (C), would have the effect of depriving it of the rights it would otherwise have to strike for recognition.

simply on the ground of an alleged abuse by the Board of its discretion. *DePratter* v. *Farmer,* 232 F. 2d 74, 76 (C. A. D. C.). If Congress' detailed specification of the method of review in the Act is to have any effect, the limitations on the district courts' power can be no less. This Court recognized that necessity, albeit indirectly, in *Inland Empire Council* v. *Millis,* 325 U. S. 697. There the Court noted that it need not decide whether the district court had jurisdiction to review certification proceedings unless there was "some showing that the Board has acted unlawfully," and held that on "the facts presented, we think no such showing has been made, whether by way of departure from statutory requirements or from those of due process of law" (*id.* at 700). For the same reasons, even the court below, which upholds the jurisdiction of the district courts, confines that jurisdiction to questions of whether the Board has acted plainly in excess of its statutory authority, has violated some express statutory command, or has denied constitutional rights. See *DePratter* v. *Farmer, supra; Farmer* v. *United Electrical Workers,* 211 F. 2d 36 (C. A. D. C.), certiorari denied, 347 U. S. 943; cf. *Air Line Dispatchers Ass'n* v. *National Mediation Board,* 189 F. 2d 685 (C. A. D. C.), certiorari denied, 342 U. S. 849 (reviewing the Mediation Board's decision that it had no statutory power over employers located outside the United States). It accordingly denies the jurisdiction of the district courts "in the wide area of determinations which depend on the Board's expertise and discretion." *Leedom* v. *Kyne,*

249 F. 2d 490, 491 (C. A. D. C.), pending on writ of certiorari, No. 14, this Term.

It follows that, even if the district court had jurisdiction, the only questions that may be reviewed in this proceeding are whether the Board has discretion under the statute to limit its jurisdiction (*infra*, pp. 18–28) and whether the Board's action violated constitutional rights (*infra*, pp. 39–40). The further question of whether the Board abused its discretion (*infra*, pp. 28–38) was not within the limited jurisdiction of the district court and hence is not before the Court here.

II

ASSUMING THE DISTRICT COURT HAD JURISDICTION, ITS DECISION ON THE MERITS WAS CORRECT

A. INTRODUCTORY STATEMENT

The Board's jurisdiction under the National Labor Relations Act reaches to the full extent of the power of Congress under the Commerce Clause. *Guss* v. *Utah Labor Board*, 353 U. S. 1, 3; *NLRB* v. *Fainblatt*, 306 U. S. 601, 606–607. The Board, however, has never had the resources to exercise its full powers. From simple necessity it has, since its very inception, been forced to limit the exercise of its jurisdiction to those enterprises which, in its judgment, had the most direct impact upon interstate commerce and in which the need for enforcement to prevent obstructions to that commerce was the most demanding. Conversely, it has consistently declined, on the ground that it would not effectuate the purposes of the Act, to undertake enforcement proceedings in those industries or

enterprises which seemed to it more "local" in character. Considerations deemed relevant have included the nature of the services rendered, the volume of interstate commerce affected, the lack of major labor disputes substantially obstructing commerce, the traditional concepts of the "local" or "interstate" character of the industry, or even a demonstrated congressional concern over labor troubles in a particular industry.

Complete consistency could not be expected in the application of such criteria. The Board has, however, engaged in a continuous process of reexamination and revision of its jurisdictional decisions to resolve inconsistencies and to adapt its enforcement policies to changes both in its facilities and in the character of the industries in which its intervention is sought. At the same time it has strived to clarify and simplify its standards in order to make its assertion of jurisdiction more predictable. Prior to 1950, the Board determined whether to exercise jurisdiction on a case-by-case basis. Since that time, partially because of prodding by Congress and by both labor and management [5] and partially because its accumulated

[5] The standards were announced following hearings in which Congress was advised of the Board's declination of jurisdiction on a case-by-case basis and an admonition by Senator Taft that the Board should "make some declaration of policy" in this respect. *Hearings before Senate Committee on Expenditures in the Executive Departments on S. Res. 248*, 81st Cong., 2d Sess. 40; *Report of the Joint Committee on Labor-Management Relations*, Sen. Rep. No. 986, Pt. 3, 80th Cong., 2d Sess. 11–15; Sen. Rep. No. 99, 81st Cong., 1st Sess. 40; H. R. Rep. No. 1852, 81st Cong., 2d Sess. 10; *Hearings before Senate Committee on Labor and Public Welfare on S. 249*, 81st Cong., 1st Sess. 175–176, 177, 1024–1025, 1286–1287.

experience by then had made it feasible, the Board has announced, in press releases and the cases before it, the general standards that guide it in taking or declining jurisdiction.

This case challenges the right and power of the Board so to evolve a policy governing the allocation of its limited time and resources among the enterprises potentially subject to its jurisdiction.

B. THE BOARD HAS DISCRETION TO EXERCISE LESS THAN ITS FULL POWERS

1. That the Board has the general power to control its docket by declining to exercise its full jurisdiction cannot seriously be questioned.[6] The Board has repeatedly asserted such a power since its establishment under the original Wagner Act,[7] and Congress has recognized the power, without question or attempt

[6] Not even admittedly partisan commentators objecting to the Board's jurisdictional policies have questioned that the power exists. See, *e. g.*, Harris, *A CIO View*, 43 Geo. L. J. 344, 358–359 (1955). Cf. Note, *Discretionary Administrative Jurisdiction of the NLRB under the Taft-Hartley Act*, 62 Yale L. J. 116 (1952).

[7] Some of the earlier cases are: *Yellow Cab and Baggage Co.*, 17 N. L. R. B. 469 (1939) (taxicabs); *Remington Rand, Inc.*, 27 N. L. R. B. 488 (1940) (service division); *McDonald Co-operative Dairy Co.*, 58 N. L. R. B. 552 (1944) (dairy industry); *Chicago Motor Coach Co.*, 62 N. L. R. B. 890 (1945) (local transit); *S. & R. Baking Co.*, 65 N. L. R. B. 351 (1946) (bakery); *Brown & Root*, 51 N. L. R. B. 820 (1943) (construction); *Cousins Tractor Co.*, 72 N. L. R. B. 857 (1947) (local sales agency); *Hubby-Reese Co.*, 72 N. L. R. B. 1404 (1947) (wholesale grocery).

to change it, with almost equal frequency.[8] With one possible exception,[9] the lower courts have unanimously upheld the Board's right to decline jurisdiction.[10]

Although this Court has on occasion reserved judgment on the propriety of a particular declination of jurisdiction, it has left no doubt as to the existence of the general power. In *NLRB* v. *Denver Building & Construction Trades Council,* 341 U. S. 675, 684, it observed that: "Even when the effect of activities on interstate commerce is sufficient to enable the Board to take jurisdiction of a complaint, the Board sometimes properly declines to do so, stating that the policies of the Act would not be effectuated by its assertion of jurisdiction in that case." The recent decisions of this Court have not impaired the validity of that statement. To the contrary, a majority of the Court, in minority opinions filed in different cases, has reaffirmed the principle in

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[8] Sen. Rep. No. 986, Pt. 3, 80th Cong., 2d Sess. 11–15; Sen. Rep. No. 99, 81st Cong., 1st Sess. 40; H. R. Rep. No. 1852, 81st Cong., 2d Sess. 10; *Hearings before Senate Committee on Labor and Public Welfare on S. 249*, Pt. 1, 81st Cong. 1st Sess. 175–177; *Hearings before Senate Committee on Expenditures in the Executive Departments on S. Res. 248*, 81st Cong., 2d Sess. 40, 120.

[9] *Joliet Contractors Ass'n* v. *NLRB*, 193 F. 2d 833 (C. A. 7) (2–1), although phrased in terms of an abuse of discretion by the Board in declining jurisdiction, can arguably be read as limiting the Board's discretion to determinations of "substantiality" of the impact on interstate commerce.

[10] *E. g., Optical Workers' Union* v. *NLRB*, 227 F. 2d 687 (C. A. 5), certiorari denied, 351 U. S. 963; *Haleston Drug Stores, Inc.* v. *NLRB*, 187 F. 2d 418 (C. A. 9), certiorari denied, 342 U. S. 815; *Local Union No. 12* v. *NLRB*, 189 F. 2d 1, 3, 5 (C. A. 7), certiorari denied, 342 U. S. 868; *NLRB* v. *Daboll*, 216 F. 2d 143, 144–145 (C. A. 9), certiorari denied, 348 U. S. 917.

even more explicit terms.[11] The controlling opinions in those cases, in turn, carefully limited their reservations to particular applications of the power, not questioning the power itself.[12]

The justification for the Board's declination of jurisdiction has sometimes been found in the permissive language of the provisions authorizing the Board to process unfair labor practice charges: it is "empowered," not directed, to prevent such practices (§ 10 (a)) and has the "power," not the duty, to issue complaints and conduct hearings (§ 10 (b)). See, *e. g.*, *Haleston Drug Stores* v. *NLRB,* 187 F. 2d 418, 421 (C. A. 9), certiorari denied, 342 U. S. 815. More fundamentally, however, the right springs from practical necessity and is implicit in the nature of the administrative process; its recognition is to be found in the purpose of the Act as a whole rather than in particular provisions. As this Court has recognized, "unquestioned powers are sometimes unexercised from lack of funds, motives of expediency, or the competition of more immediately important concerns." *United States* v. *Morton Salt Co.,* 338 U. S. 632, 647–648. "The Board is not a court whose jurisdiction over violations of private rights must be exercised. It is an administrative agency whose function is to adjudicate public rights in a manner that will effectuate the policies of the Act." *Guss* v. *Utah Labor Board,*

[11] See *Guss* v. *Utah Labor Board*, 353 U. S. 1, 12, 13–14 (opinion of Mr. Justice Burton, joined by Mr. Justice Clark); *Office Employes* v. *NLRB*, 353 U. S. 313, 321)opinion of Mr. Justice Brennan, joined by Justices Frankfurter, Burton, and Harlan).

[12] See *Guss* v. *Utah Labor Board*, 353 U. S. 1, 4; *Office Employees* v. *NLRB*, 353 U. S. 313, 320.

353 U. S. 1, 13 (Burton, J., dissenting). The Board, "as a public agency acting in the public interest, not any private person or group, not any employee or group of employees, is chosen as the instrument to assure protection from the described unfair conduct in order to remove obstructions to interstate commerce." *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U. S. 261, 265. Since the Act creates only rights "in the interest of the public" to be protected by "a public procedure, looking only to public ends," rather than "private rights" to be vindicated at the instance of private persons (*Agwilines, Inc.* v. *NLRB*, 87 F. 2d 146, 150–151 (C. A. 5)), it is only reasonable to infer that Congress intended the Board to have "complete discretionary power to determine in each case whether the public interest requires it to act" (*NLRB* v. *Newark Morning Ledger Co.*, 120 F. 2d 262, 268 (C. A. 3), certiorari denied, 314 U. S. 693).

The Court noted in *Guss* v. *Utah Labor Board*, 353 U. S. 1, 11–12, that:

> The testimony given by the Chairman of the Board before the Appropriations Committees shortly before the 1954 revisions of the jurisdictional standards indicates that its reasons for making that change were not basically budgetary. They had more to do with the Board's concept of the class of cases to which it should devote its attention. *Hearings before Subcommittee of House Committee on Appropriations, Department of Labor and Related Independent Agencies*, 83d Cong., 2d Sess., 309, 315, 323.

That, of course, is not inconsistent with our position here, for the Court was there speaking of statements before Congress on the desirability of increasing appropriations. The crucial point is that, once Congress has acted and the Board's budget is fixed, the Board has no choice but to stay within it and must restrict its enforcement activities to whatever extent is necessary to do so. Since the Board has in fact consistently utilized all the resources given it by Congress, and nevertheless has a heavy backlog of cases,[13] it necessarily follows that the Board can extend its activities in one direction only by curtailing them in another.

We are not unaware that the Board's inability to exercise its full powers under the Act, combined with the holding in *Guss* v. *Utah Labor Board,* 353 U. S. 1, that the states are precluded from acting in areas subject to the Board's unexercised powers, creates a hiatus in the regulation of labor relations. However, in response to the decision in the *Guss* case and fully aware of the problem disclosed by that decision, Congress has already acted to increase the Board's appropriations by some $1,500,000. (Act of August 1, 1958, Pub. Law 85–580). The Board, in turn, has undertaken a review of its jurisdictional policies to determine how, with its increased appro-

[13] "At the end of June [1958] 6,382 cases of all types were pending disposition at various procedural levels. This compares with 4,416 pending June 30, 1957." NLRB Press Release, August 11, 1958. The Board chairman has testified that the backlog should not exceed 3,000 cases if the Board is to perform its function effectively. *Hearings before Subcommittee of House Committee on Appropriations on National Labor Relations Board and Related Agencies.* 83d Cong., 1st Sess. 13.

priations, its enforcement activities should be expanded. While that action may not alone be sufficient completely to resolve the problem, it is an important step, and the determination of what further steps should be taken—whether a grant of limited jurisdiction to the states, a further increase in the Board's appropriations, the creation of judicially-enforceable rights, or some other alternative—still lies with Congress.

2. Petitioners apparently concede the right of the Board to decline jurisdiction over an enterprise in unfair labor practice proceedings. They seek, however, to draw a distinction between unfair labor practice proceedings and certification proceedings. The sole basis of the argument is that, while § 10 provides only that the Board is "empowered" to process unfair labor practice charges, § 9 (c) provides that upon the filing of a representation petition "the Board *shall* investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists *shall* provide for an appropriate hearing."

As noted above, however, the right of the Board to decline jurisdiction over an enterprise does not depend on the particular wording of § 10 but derives from administrative necessity and the purpose of the Act as a whole. If the difference in wording of § 10 and § 9 (c) has any significance in this context at all,[14] it would be much more limited than petitioner suggests. Even when the Board has taken "juris-

[14] But see pp. 26–27, *infra*.

diction" over an enterprise, it still retains, as petitioner recognizes (Br. 23), the traditional discretion of the prosecutor whether or not to prosecute a particular charge. That is, even in an industry over which it has taken jurisdiction, § 10 only empowers and does not require the Board to issue complaints. Arguably the different language of § 9 (c) means that, if the Board has taken jurisdiction over an enterprise, it has no discretion not to process representation petitions. That is not relevant to this case, however, since the question here is whether the Board may decline jurisdiction for all purposes.

An even more fatal flaw in petitioners' argument is that the primary purpose of certification under § 9 (c) is to lay the foundation for a subsequent unfair labor practice charge against the employer for a refusal to bargain, a charge which is enforceable only by the Board. Hence it would be anomalous to require certification when the Board declines jurisdiction over the industry in unfair labor practice proceedings. Surely Congress, having authorized the Board to concentrate its energies on preventing unfair labor practices in those enterprises deemed most important to interstate commerce, did not then turn around and require the Board to dissipate those energies in certification proceedings the primary purpose of which is frustrated.

Petitioners point out that before the 1947 amendments the Act provided that the Board 'may investigate" representation petitions and that in 1947 the language was changed to "shall investigate." If anything, however, that harms rather than helps peti-

tioners' case, for, as will be seen, it shows that the difference in wording between § 10 and § 9 (c) had nothing to do with the power of the Board to decline jurisdiction. Petitioners impliedly concede that, prior to 1947, the Board did have discretion to decline jurisdiction in representation proceedings. If so, however, it still does, for it is patent that Congress in 1947 had not the slightest intention of changing the Board's jurisdictional powers and that the changes of wording were directed to entirely different purposes.

The word change to which petitioners point was not an isolated change made in the text of the section for a particular purpose; rather the entire section was completely rewritten for purposes which are apparent both from a comparison of the new section (Pet. Br. 29–30) with the old (Pet. Br. 21) and from the legislative history. The major change was the addition of two new subsections ((1) (A) and (1) (B)) to make clear that employers and nonunion employees, as well as unions, can petition for elections. In addition, the use of a secret ballot was made mandatory. In all of the copious legislative history of the 1947 Act there is not a single mention of any other substantive change intended by the new section. See, *e. g.*, Sen. Rep. No. 105, 80th Cong., 1st Sess. 10, 25; 93 Cong. Rec. 4143.

The absence in the legislative history of any reference to a change in the Board's jurisdictional powers should, in itself, be conclusive that no such change was intended, for it is inconceivable that Congress would have so drastically increased the duties of the

Board without comment. We need not rely on the legislative history, however, for the very text of the section discloses that the word change upon which petitioners rely was made for an entirely different purpose. Section 9 (c) of the Wagner Act had provided:

> Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing * * *.

As revised in 1947, the section provides:

> Whenever a [representation] petition shall have been filed * * * the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing * * *.

The former section did not expressly distinguish between the preliminary investigation and the final determination of the representation issue. It provided only that the Board "may investigate * * * and certify." Since the section further required a hearing in "any such investigation," the section was susceptible of the construction that, if the Board investigated at all, it was required to hold a hearing—even if it appeared that there was no substantial factual issue as to the desires of the employees. The Board, however, inferred an implied power to make a preliminary investigation, without a hearing, to deter-

mine whether there was a "substantial" question of representation. The new section simply spells out these separate steps. It expressly provides that the Board shall first make a preliminary investigation to determine whether there is "reasonable cause" to believe that there is a question of representation, and only if it so finds must it have a hearing. The new language was thus declaratory of the practice developed by the Board and, as the committee reports noted, "does not change the Board's rules of decision with respect to requirements of substantiality in order to obtain a hearing." Sen. Rep. No. 105, 80th Cong., 1st Sess. 10, 25; see also 93 Cong. Rec. 4143. Clearly, therefore, the change was concerned only with the procedure followed by the Board in cases *over which it exercises jurisdiction* and not with the question here of whether the Board must exercise jurisdiction at all.

To summarize: It is settled that the Board has discretion to limit the exercise of its power to those enterprises which have the most significant impact upon interstate commerce. That power derives primarily from practical necessity and the purposes of the Act as a whole rather than from the particular wording of § 10. Hence the difference of wording in § 9 (c) is immaterial. It would be anomalous to require the Board to entertain certification proceedings in enterprises in which it is not required to, and would not, enforce the duties arising from certification. Finally, both the section itself and the legislative history reveal that the 1947 amendments to § 9 (c) were intended solely to clarify the preliminary-investigation procedure followed by the Board in

cases in which it does assert jurisdiction, and was not intended to affect the Board's power to decline jurisdiction altogether. Clearly, therefore, the Board may decline to entertain representation petitions on the same standards that it applies in unfair labor practice proceedings.

C. THE BOARD DID NOT ABUSE ITS DISCRETION IN DECLINING TO TAKE JURISDICTION OVER THE HOTEL INDUSTRY

Petitioners contend that, even if the Board has discretion to decline jurisdiction, its refusal to take jurisdiction in the hotel industry was an abuse of that discretion. That very policy has, however, been recognized and approved by the courts.[15] In any event, it is clear that the action complained of was well within the bounds of the Board's discretion.

1. The context of the Board's jurisdictional decisions is one of choice among competing interests. The Board does not decide in the abstract whether an enterprise should be regulated or not. Rather it starts with the datum that, however desirable regulation of all the enterprises subject to its jurisdiction might be, it lacks the capacity to undertake it. The problem is to determine in *which* areas its limited resources can most profitably be spent. That is necessarily a "policy" judgment in the broadest sense of that term. It requires a practical appraisal of a mul-

[15] Most expressly in *NLRB* v. *Eanet*, 179 F. 2d 15, 18 (C. A. D. C.), where the court expressed the view that the Board might even extend its policy to hotels in the District of Columbia. See note 18, *infra*. See also *Phillips Petroleum Corp.* v. *NLRB*, 206 F. 2d 26, 28–30 (C. A. 5), noting the existence of the policy.

titude of factors that cannot be stated in objective formulae. The dollar volume of interstate business has never been, and cannot be, the sole criterion. The "nature" of the industry, the history of its labor relations, the traditional characterization of the business, the prevalence of labor disputes, the impact of its labor disputes on other industries, the effect of regulation on the enterprise's competitive position with respect to unregulated enterprises, the desires of labor and management in the industry, disclosed congressional intent with respect to the particular industry—these are all factors relevant to the Board's determination. And always the evaluation of these factors must be made in comparative terms: whether the demands of one industry for the Board's attention are more compelling than the competing demands of others.

In a case where the Board is found to have acted on the basis of an isolated criterion which it is concluded is not relevant to the purposes of the Act or is, indeed, contrary to expressed congressional intent, the Board's declination of jurisdiction can, of course, be set aside by the courts. See *Office Employes* v. *NLRB,* 353 U. S. 313, discussed *infra,* pp. 36–38. Where, however, such an isolated motivation for the Board's action is absent and its judgment is based on an evaluation of the multitude of factors considered above, none of which is controlling but all of which are relevant, it cannot be said that the Board's action is capricious or arbitrary. "Discretion," "administrative policy," "expertise," "quasi-legislative functions," are words which have been used to epitomize

the general attitude of the courts in dealing with administrative judgments of this sort.

In this case petitioners have suggested no improper criteria by which the Board was, or might have been, guided. That should be the end of the matter. Nevertheless, in the light of petitioners' vigorous attack on the Board's "hotel policy", it may be worthwhile to suggest some of the considerations that support the Board's action.

First, the primary service performed by hotels—the furnishing of lodging for customers while they are on the hotel premises—is peculiarly "local" in nature. As Senator Taft observed, "A hotel performs its service within four walls. It ships nothing into commerce. It produces no goods for commerce." 95 Cong. Rec. 12471. While undoubtedly the hotel industry is, at least in part, subject to the commerce power, the impact of its operations upon that commerce are relatively slight in comparison with other industries to which the Board might alternatively direct its attention. However this is expressed, indisputably the hotel business has a "local" flavor.

Second, the industry is, in the main, composed of small units. Available statistics indicate that in 1954 approximately 85% of the 25,000 hotels had annual receipts under $100,000, and only 6% had receipts over $300,000.[16] Petitioners seem to suggest that because the Board draws a line in other industries on

[16] Bureau of Census, U. S. Census of Business, 1954, vol. V, Selective Service Trades—Summary Statistics, Table 2A, c. 2, p. 30; Table 6A, c. 2, pp. 2–5 (U. S. Govt. Print. Off., 1957).

the basis of dollar volume of business (*e. g.*, it takes jurisdiction over retail establishments with receipts in excess of $500,000), it must also do so in the case of hotels. But, quite apart from the difference in character of the industry, the fact that such a small portion of the industry would be within it might make a classification on that basis inappropriate in the hotel industry. An arbitrary line based solely on the dollar amount of business inevitably works inequities between those treated differently notwithstanding that their positions are otherwise similar. Employees in one enterprise doing the same work as those in another are denied the same protection; so, too, are their employers. The competitive position of the regulated enterprise vis-a-vis unregulated competitors may also be affected. Other things being equal, therefore, it is obviously desirable that the whole industry be treated alike. In many cases, however, "all or none" is not a feasible solution. The large enterprises, representing the predominant share of the industry, have such a direct impact upon interstate commerce as to demand the Board's supervision. On the other hand, the Board does not have the resources to regulate all of the enterprises in the industry. In such cases, the Board has little choice but to establish an arbitrary criterion of size. In the hotel industry, however, it would seem that not only does the industry as a whole not have such a direct impact on commerce, but the large hotels do not, in view of the predominance of small units, have a disproportionate significance within the industry. Hence not enough could be accomplished by asserting juris-

diction only over the large hotels to justify singling them out from the rest of the industry.

Third, there is the matter of history. Since the beginning of the original Wagner Act the Board has consistently declined to assert jurisdiction over the hotel industry.[17] *White Sulphur Springs Co.*, 85 N. L. R. B. 1487; *Hotel Ass'n of St. Louis*, 92 N. L. R. B. 1388, 1389–1390; NLRB, *Sixteenth Annual Report*, 38–39 (1952).[18] That policy has, by and large, been strongly supported by both labor and management—which in itself is a relevant consideration. Indeed, the very international that is the petitioner in this case, the largest union by far in the hotel field, strongly urged the Board, in *Hotel Ass'n of St. Louis, supra,* to adhere to that policy. While the Board recognizes its right and duty to reexamine its jurisdictional policies in the light of changing circumstances and, if necessary, to revise them, there is nevertheless an important value to be served by fol-

[17] Petitioners assert that in 1949 the Board asserted jurisdiction in the *Vanderbilt Hotel* case (Case No. 10–CA–577), issued a complaint, and entered into a formal settlement. The complaint and settlement were made, however, at the instance of the Board's then General Counsel who, in disagreement with the Board, believed that the Board should exercise its full jurisdiction. See *Hearings before Joint Committee on Labor-Management Relations*, 80th Cong., 2d Sess., Pt. 2, pp. 1155, 1157–1159. The Board's records disclose that the Board, for jurisdictional reasons, declined to approve the stipulation, which had been made subject to its approval.

[18] The Board does take jurisdiction over hotels located in the District of Columbia, since § 2 (6) of the Act gives the Board plenary power in such cases. See *NLRB* v. *Eanet*, 179 F. 2d 15, 18 (C. A. D. C.). For the same reason the Board, until recently, asserted jurisdiction over hotels in the Territories. See *Virgin Isles Hotel*, 110 N. L. R. B. 558.

lowing established precedent whenever possible. For the Board to determine *de novo* in every case, without regard to precedent, whether to assert jurisdiction would not only defeat a primary purpose of the jurisdictional policies—to keep the Board's docket manageable—but would also not promote stable industrial relations. / Whether the Board will exercise jurisdiction in the industry affects in many ways the patterns of behavior that are established in the industry—the scope of bargaining, the resort to self-help, the manner of obtaining recognition, etc. Taking jurisdiction in one case and leaving the parties to their own devices in another could only have an unsettling effect and would not only fail to promote but would actively frustrate the purposes of the Act. Hence predictability and consistency are a primary desideratum in the Board's jurisdictional decisions. Once a *modus operandi* has become established in the industry, whether based on the Board's exercise or nonexercise of its jurisdiction, it should be changed only for the most cogent and compelling reasons.

Fourth, there has been a relative absence of major labor disputes in the hotel industry. Between 1948 and 1957 there has been a maximum of 31 (in 1951) and a minimum of 10 (in 1949) work stoppages in the industry in any one year. The maximum number of workers involved was 4,830 (in 1951) and the minimum was 510 (in 1954). Bureau of Labor Statistics, *Analysis of Work Stoppages,* 1948 through 1957. When it is realized that the total number of workers involved in all work stoppages in those years ranged from a minimum of 1,530,000 to a maximum of 2,220,-

000 (*ibid.*), it becomes apparent that labor disputes in the hotel industry have not been so pressing a problem as to justify the diversion of the Board's efforts from more troubled areas. This experience, indeed, far from providing a compelling reason for the Board to reverse its policy in the hotel industry, has been a complete vindication of the Board's original judgment in concentrating its energies elsewhere.

Finally, Congress has been aware of the Board's policy in the hotel industry and has never seen fit to change it.[19] To the contrary, members of Congress have on several occasions since the passage of the 1947 Act expressly approved of the Board's policy.[20] Chief among these was Senator Taft, the architect of the 1947 amendments, who stated in 1949 that "In my opinion the Act was never intended to cover the hotel industry." 95 Cong. Rec. 12471. We agree, of

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[19] In *Hearings before Senate Committee on Labor and Public Welfare on S. 55 and S. J. Res. 22*, 80th Cong., 1st Sess., Pt. 4, pp. 2343–2344 (March 13, 1947), the Committee's attention was directed to the Board's policy in the hotel industry and amendments were proposed to change that policy. On July 27, 1955, Senator Lehman introduced a bill providing that "Nothing in the Act shall be construed to authorize the Board to decline to exercise jurisdiction over any labor dispute solely by reason of the fact that the employer in such dispute is the operator, or agent of the operator, of one or more hotels" (S. 2651, 84th Cong., 1st Sess.). Like other bills designed to change or modify the Board's jurisdictional standards, that bill was not enacted. See also Sen. Rep. No. 1684, 85th Cong., 2d Sess. 25.

[20] See *Hearings before Subcommittees of House Committee on Education and Labor and of House Committee on Expenditures in the Executive Departments*, 80th Cong., 2d Sess. 2–9, 37–41 (May 7, 1948); H. R. Rep. No. 2050, 80th Cong., 2d Sess. 2–5.

course, that these post-enactment expressions of opinion have limited value in interpreting the Act and did not in themselves impose a duty on the Board not to take jurisdiction over the hotel industry. On the other hand, in deciding whether to depart from a long-established policy, an administrative agency may properly take into account the fact that that policy has been expressly approved by Congressmen directly concerned with overseeing its operations.

The above is but an enumeration of some of the considerations supporting the conclusion that the hotel industry is essentially a "local" business without a sufficient impact upon interstate commerce to justify the expenditure of the Board's limited resources. The listing is not meant to be exhaustive, and we do not say that there are not other factors equally relevant which might support a contrary determination. The final judgment, however, is for the Board to make. For purposes of judicial review it is enough that the Board has not been shown to have acted on a basis obviously irrelevant to the purposes of the Act or contrary to an expressed purpose of Congress. In this case, the obvious pertinency of the factors suggested above to the purposes of the Act should dispel any such doubts.

2. Petitioners suggest that an anomaly exists in the Board's jurisdictional standards in that jurisdiction is taken over independent restaurants grossing $500,000 a year but not over hotels which house restaurants with equal receipts. If there are anomalies within the Board's standards, however, they are the product not of arbitrariness on the part of the Board but of

the immense complexity of the problem. The Board's right to restrict its activities to a manageable scope can be effectively implemented only by defining broad and clear-cut categories. When this is done over an area as extensive as that encompassed by the commerce power, it is inevitable that some of the categories, when taken out of context and compared one with the other, may seem "arbitrary" in the sense that the distinctions, if viewed in isolation from the overall problem, may seem minor. That, however, is the price that must be paid for simplicity and predictability. The most that can be asked is that the administrative agency continue in its efforts, by means of periodic reappraisals, to seek out and remedy any such anomalies or inconsistencies.

We do not think, however, that such an anomaly exists in this case. A restaurant is typically only incidental to the hotel's primary function of providing lodging. To require the Board to take jurisdiction over the entire enterprise because it might take jurisdiction over an incidental part of it were it a separate establishment would be to allow the tail to wag the dog. On the other hand, to take jurisdiction only over the restaurant part of the unitary business would fractionalize the relationship between the employer and the union, which usually represents, as here, both restaurant and non-restaurant employees. While the Board's resolution of this problem may not be the only possible one, it is certainly not an unreasonable one.

3. From what has been said of the basis for the Board's hotel policy, it is clear that petitioners' reliance on *Office Employes* v. *NLRB,* 353 U. S. 313, is

misplaced. In that case the Board had declined jurisdiction over disputes between labor unions and their own office employees for the reason that unions, like nonprofit organizations, were engaged in noncommercial pursuits. This Court reversed, noting that Congress had expressly included labor organizations, when acting in relation to their own employees, within the definition of employers (§ 2 (2)) and that the legislative history unequivocally showed that Congress thereby intended to subject labor unions to the provisions of the Act. Hence, the Court found, the Board's exception of labor unions solely because of their peculiar status—*i. e.,* solely because they were unions—was inconsistent with the express mandate of Congress.

From a reading of the Court's opinion in *Office Employes,* it is apparent that the problem there posed was *sui generis.* It involved the peculiar organic structure and purposes of labor unions and it arose against a background of a "'strikingly particular reference'" in the Act (*id.* at 319) and of an equally particularized manifestation of intent in the legislative history. In essence, the opinion holds that the Board's classification of labor unions was based on a ground that Congress had expressly considered and rejected—to wit, that a labor union, because of its fraternal organization and its purposes of mutual betterment, should not be treated like other employers. To read more than that into the language of the Court is to ignore the setting in which that language was used.

Petitioners seek to read the opinion as prohibiting

the Board from ever declining jurisdiction over a group of employers "as a class." In denying the Board's power to decline jurisdiction over "union employers as a class," however, the Court was referring only to a "class" defined by the fact that the employers are "unions"—a basis for classification which the Court found to have been rejected by Congress. The Board can effectively implement its jurisdictional powers only by defining "classes" of some sort. A category including all enterprises within an industry with gross receipts less than a stated amount is as much a "class" as a category which includes the whole industry. Nor is there any other difference in kind between the standards. The Board simply limits its jurisdiction to those enterprises within each industry which it concludes have a sufficient impact on commerce to justify its taking jurisdiction. Depending on the nature of the industry, it may be many, it may be few, or (as in the case of the hotel industry) it may be none. The nature of the Board's determination in each case, however, remains the same. The vice in the *Office Employes* case was not that the jurisdictional standard operated upon a "class," as do all jurisdictional standards, but that the particular basis of classification was improper.

At all events, the Court in the *Office Employes* case, as if to avoid such a dispute over the implications of its language, expressly reserved judgment on the power of the Board to decline jurisdiction on the basis of the "local" character of the industry, citing as an example the decision of the district court in this very case (*id.* at 320 n. 13). It is that question that

is now before the Court and, whatever the answer may be, it is not to be found in the *Office Employes* case.

D. THE BOARD'S ACTION VIOLATED NEITHER THE CONSTITUTION NOR THE ADMINISTRATIVE PROCEDURE ACT

1. Petitioners contend that the Board's dismissal of their representation petition without affording them an opportunity to submit evidence on the impact of the Florida hotel industry on interstate commerce deprived them of due process of law. The contention is frivolous.

There is no occasion to reach the questions whether the Board's action deprived petitioners of any "rights" or, if so, whether due process requires a hearing before such action is taken. For in any event petitioners were in fact afforded a full hearing. Petitioners were granted oral argument before the full Board and were permitted to file extensive briefs and supporting data to show why the Board should modify its policy and take jurisdiction in this case. The petitioners fully exercised those rights, and submitted with their briefs detailed data on the interstate commerce aspects of the hotel industry both in the Miami area and in Florida as a whole. The data, some of which is summarized in petitioners' brief (p. 7), included, for example, statistics on the number of tourists and the length of their stay, tourist expenditures in the area, the number of hotel units, the number of employees, and information on the relationships between labor and management in the industry. Petitioners do not suggest that they had any other relevant facts to present. None of these

assertions of fact was in any way questioned by the Board. The Board accepted them as true for purposes of decision and ruled that the facts asserted were insufficient to make the exercise of jurisdiction appropriate. Clearly petitioners cannot complain of a denial of an opportunity to prove allegations of fact which the Board willingly accepted as true.

2. Petitioners suggest that, because the Board has made known the general policies that will guide it in determining whether to take jurisdiction, those policies have become "rules" which must be promulgated by the rule-making procedure prescribed by the Administrative Procedure Act. Petitioners have the cart turned around. The most that they can contend is that, because the Board's general pronouncements of the policies it will follow were not promulgated pursuant to rule-making procedures, they cannot have the status, or the legal force and effect, of "rules." But no one contends that they do. The announcements of the Board's jurisdictional policies do not purport to be binding on anyone, either labor, management, or the Board itself. The Board has no obligation, either statutory or otherwise, to make such announcements and could, if it chose, confine its opinions to the facts of each case, leaving to inference from the pattern of its decisions the policies that it is applying. See *Securities & Exchange Commission* v. *Chenery Corp.*, 332 U. S. 194, 201–203; *Columbia Broadcasting System* v. *United States*, 316 U. S. 407, 421. However, because of the importance to industry and labor of predictability of the Board's jurisdictional policies, the Board has sought, in deciding the

cases before it, to spell out the policies it will apply.[21] Such statements have no force except as precedent, and the Board reserves the full power to depart from them when circumstances indicate the wisdom of that course. In this very case, in fact, the Board heard full argument on the question and concluded that no such circumstances were present. That the Board, in the interest of consistency and predictability, tends to adhere to precedent in the absence of cogent reasons for a departure—a practice obviously necessary to sound administration—does not convert those precedents into "rules" required to be promulgated by "rule-making" procedures.[22]

At all events, petitioners' contention, even if valid, is of no help to them. If the Board's prior public announcements were held to be "invalid" for failure to comply with rule-making procedures, the Board would still have to decide whether the assertion of jurisdiction in this case would further the purposes of the Act. And in doing so, it would obviously find

[21] It should be noted that the Board's hotel policy has been evolved solely by a process of decision-making in individual cases, though, as a basis for decision, it was obviously necessary to consider the nature of the industry as a whole.

[22] While, for the reasons stated, it is immaterial whether the Board's policies could be given the effect of "rules," it may be noted that the announcements did not in fact fail to comply with the substantive procedures (*i. e.*, other than publication of the final rule in the Federal Register) required for "rule-making." Section 4 (a) of the Administrative Procedure Act, 5 U. S. C. 1003 (Pet. Br. 32–33), expressly excepts "interpretive rules" and "general statements of policy" from the notice and hearing requirements, and the policies announced here would seem clearly to be within that category.

the considerations underlying its earlier pronouncements still to be controlling—as, indeed, the Board did upon the argument in this case.

CONCLUSION

For the foreging reasons it is respectfully submitted that the judgment of the court below should be affirmed.

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No. 21

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

HOTEL EMPLOYEES LOCAL NO. 255, HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION, ET AL.,

Petitioners,

v.

BOYD LEEDOM, individually and as Chairman, National Labor Relations Board, et al.

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

PRELIMINARY STATEMENT

The Board predicates the arguments in its brief on the following assumptions:

1. The instant cause primarily involves the question of the Board's discretionary authority. (Pp. 6, 10-23, Brief)

2. The decision in *Office Employees* is *sui generis*. (Pp. 36-39, Brief)

3. The Board has determined that the hotel business is essentially local in character. (Pp. 8, 28-36, Brief)

4. The primary purpose of certification proceedings under Section 9 (c) of the Act is to lay the foundation for subsequent unfair labor practice proceedings under Section 10 of the Act. (Pp. 7, 23-28, Brief)

The succeeding argument will demonstrate the error of these assumptions.

ARGUMENT

I.

THE DISTRICT COURT HAD JURISDICTION TO REVIEW THE ACTION OF THE BOARD HEREIN.

The Board's contention that section 9 (d) of the Act precludes judicial review in the instant case cannot be sustained for the reason that said section provides only for a review of errors arising in affirmative acts of certification by the Board.[1] It does not eliminate judicial review challenging acts of the Board which preclude all agency action. The instant case is therefore analagous to *Leedom, et al* v. *International Union of Mine, Mill & Smelter Workers*, 352 U.S. 145 (1956) and not *Leedom* v. *Kyne*, 249 F. 2d 490 (CA-DC, 1957), No. 14, this Term.[2]

The Board concedes that the District Court has jurisdiction to review acts of the Board "plainly beyond the scope of its statutory authority" or in violation of the Constitution (Brief, p. 14). Its argument that the instant

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[1] The position that there is no jurisdiction to review contravenes the Board's position in *Breeding Transfer, Inc.*, 110 NLRB 493.

[2] *Fay* v. *Douds*, 172 F. 2d 720 (CA-2, 1949); *Farmer* v. *The United Electrical Workers*, 211 F. 2d 36 (CA-DC, 1953) cert. denied, 347 U.S. 943.

cause involves only a question of discretion and, therefore, that the District Court had no jurisdiction presumes the answers to the very statutory and constitutional issues which are presented to this Court for determination.

II.

THE DECISION OF THIS COURT IN OFFICE EMPLOYEES IS CONTROLLING.

The Board's argument that the holding in *Office Employees* v. *National Labor Relations Board*, 353 U.S. 313 (1957), is not applicable ignores one of the two holdings of the majority of this Court in that case. It is submitted that the majority held as follows in *Office Employees*:

1. Labor organizations are employers under Section 2 (2) of the Act with respect to their own employees.
2. The Board is without power to decline jurisdiction over an entire category of interstate employers.

The minority, on the other hand:

1. concurred in the holding that labor organizations are employers under section 2 (2) of the Act with respect to their own employees.
2. dissented from the holding that the Board does not have power to decline jurisdiction over an entire category of interstate employers. The minority held, however, that such declination must be for proper reasons.
3. held that the Board did not have proper reasons for excluding from the Act the entire category of labor organizations when acting as employers.

The Board argues that *Office Employees* is *sui generis*. It states: (Brief, p. 37)

> "In essence, the opinion holds that the Board's classification of labor unions was based on a ground that Congress had expressly considered and rejected—to-wit, that a labor union, because of its fraternal organization and its purposes of mutual betterment, should not be treated like other employers."

It is submitted that the above statement perverts the very point on which this Court split in *Office Employees,* and sets forth the view of the minority as if it were the holding of the majority of this Court.

The Board goes on to argue that this Court did not intend *Office Employees* to prohibit the Board from excluding entire classes of interstate employers because such a holding would prohibit the Board from setting up dollar volume jurisdictional standards. It is submitted that this Court did not equate the exclusion of an entire class of interstate employers with the exclusion of small employers whose business volume does not sufficiently affect commerce.[3] Such an exercise of discretion, however, is vastly different from the assumption of the power to decline jurisdiction over all employers in a particular industry, without regard to the size or the impact on interstate commerce of any of the employers in that industry. The exercise of such power is an exercise of the Congressional power of repeal. *Office Employees,* 353 U.S. 313, 315.

Even the minority opinion in *Office Employees,* however, requires a reversal in the instant cause, since the reason given by the Board for declining jurisdiction was not a proper reason. As set forth at pages 13 to 16 of the Brief of Petitioner, the reason that the Board excluded the hotel industry "has rested on a conclusion that Congress intended to exempt the industry". 5 CCH, Labor Law Reporter, par. 50,099; 42 LRR 448, 9.

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[3] The Board's theory of refusing to assert jurisdiction in cases where an employer does less than a particular total amount of business is simply an application of the maxim *"de minimis non curat lex." NLRB* v. *Fainblatt,* 306 U.S. 601, 607 (1939); *Joliet Contractors* v. *NLRB,* 193 F. (2d) 833 (CA-7, 1952).

The Solicitor General ignores these facts and instead states that the Board has concluded that "the hotel business is essentially local in character and does not have a sufficient impact on commerce as to justify this diversion of the Board's limited resources from more pressing matters". (Brief, p. 8) We must respectfully point out to the Court that there is nothing in the record to justify the foregoing quoted statement.[4] No such finding was made by the Board.

This Court should not speculate as to whether there might have been some other reasons for the declination of the Board to act. Speculation of that kind would have required the minority in *Office Employees*, after determining that the Board's reasons were not proper, to ascertain whether there might not have been some other reason for which the Board could properly have declined jurisdiction if it had considered such other reason.

Such a holding would result in this Court's being required to determine in the first instance questions the Board has never considered and on which the Board has never heard evidence. In the instance case, it would require the Court to determine the impact of the entire hotel industry on inter-state commerce. None of the commerce facts set forth in the Board's brief is in the record, and none was introduced in any hearing.[5] In fact the authority cited

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[4] Counsel for Amicus Curae recognize that the Board's declination of jurisdiction in the hotel industry is based on its interpretation of Congressional intent. They state at page 5 of Brief of American Hotel Association as follows:

"The Board did not base such refusal on the grounds that the hotels were analogous to any other class of employers, but on the well founded belief that Congress believed that labor disputes in hotels generally did not have a substantial effect on commerce."

[5] The Board refused to hold a hearing at which commerce facts could have been developed. The contention of the Solicitor General that a hearing was held is directly contrary to the record unless an oral argumnt with no evidence permitted, no opportunity to examine witnesses and for the sole purpose of determining whether the board should conduct a representation hearing in the instant case is a "hearing". Chairman Farmer recognized the need for a hearing, stating in his dissent "that the Board should give consideration after a hearing to modifying its policy so as to take jurisdiction on a limited basis pursuant to appropriate standards". (Record, Pp. 18, 19.)

for the data was not even published until 1957—2 years after the Board's decision. Yet they are being argued to this Court.[6]

Similarly, the Solicitor General "suggests" the "relative absence of labor disputes in the hotel industry" as a possible basis for the Board's policy. (Brief, p. 33) Again there is no evidence in the record concerning the existence or non-existence of labor disputes other than that of the Miami Beach employers herein.[7]

The Board based its decision solely on the premise that Congress intended to exempt the hotel industry. Counsel for the Board cite only two authorities to substantiate this conclusion of the Board.

The first authority is a statement of Mr. Charles Sands introduced into the hearings before the Senate committee on Labor and Public Welfare on S. 55 and S. J. Res. 22, 80th Cong., 1st Sess. P. T. 4, pp. 2343-2344 (March 13, 1947). Mr. Sands' first sentence after introducing him-

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[6] The following facts may also be derived from the same source cited by the Solicitor General, that is, the Bureau of Census:

There are 11,000 hotels in the United States having over twenty-five rooms. Approximately 1500 of these have receipts of over $300,000 per year. Hotels whose receipts are in excess of $500,000 annually account for more than one-half of the entire industry receipts of approximately two and one-half billion dollars. These hotels employ 270,000 of the 377,000 persons employed in the industry and paid $473,000,000 of the hotel industry's payroll of $802,000,000. Bureau of Census, U. S. Census of Business, 1954, Vol. V, Selective Service Trades, Summary Statistics, Table 2A, C-2, p. 30.

The annual dollar volume of the hotel industry is more than twice that of the total receipts of the soft drink, beer and liquor manufacturing industries combined. It is more than twice that of the men's and boys' suit and coat industry. It is one and one-half times that of the cigarette industry. Since the hotel industry is primarily a service industry, the size of the payroll in the hotel industry shows an even greater disproportion to the size of payrolls in other industries. Thus the annual hotel industry payroll is eight times greater than that of the cigarette industry. This Court should also note that the hotel industry receipts are 340 times greater than those of all skating rinks in the United States, over which the Board has asserted jurisdiction. Bureau of Census, U.S. Census of Mfg., 1954, Vol. 1, Summary Statistics Table 2A, C-2, pp. 4, 6, 20, 27.

[7] Nor was there ever any evidence on this point or reference to it in the Board's opinions in either of the two other hotel cases by the Board declining jurisdiction, i.e., *St. Louis Hotel Association*, 92 NLRB 1338 (1951) and *White Sulphur Springs, Inc.*, 85 NLRB 1487 (1949). In fact, the Board is unable to cite any case in any industry where the factor of the existence or absence of labor disputes was considered by the Board as a basis for declining jurisdiction in the industry.

self was as follows: "Our attorneys are of the opinion that our industry which is, I believe, the third largest, is now covered by the National Labor Relation Act."[8] The only logical conclusion that can be drawn from the foregoing statement is that the Senate Committee was advised in 1947 that the Act, as then written, covered the hotel industry.

The second authority relied upon by the Board is a post-enactment statement of Senator Taft. Such a post-enactment statement, however, cannot be deemed an expression of Congressional intent any more than the contrary opinion of five senators expressed on the floor of the Senate on July 20 and 27, 1955, Cong. Rec. 84th Cong., 1st Sess., Vol. 101, Part. 9, pp. 11008, 11636-39.

It is submitted that neither of the foregoing references provide an argument sufficiently persuasive to overcome the plain words and meaning of the statute and cause the addition of the words "except hotels" to the other exceptions set forth in Section 2 (2) of the Act.

[8] Amicus Curae at page 7 of its brief quotes a portion of Mr. Sands' statement out of context. The third sentence preceding the one quoted and prefacing the quoted statement was as follows: "Under a close reading of the Act, we can reach only the conclusion that it is drafted in as broad language as is possible under the Interstate Commerce clause of the Constitution, and that it does apply to hotels."

III.

SECTION 9 (c) OF THE ACT IS A MANDATORY DIRECTION TO THE BOARD TO ACT IN REPRESENTATION CASES WHEN A QUESTION OF REPRESENTATION AFFECTING COMMERCE EXISTS.

The Board contends that the word "shall" in Section 9 (c) is not mandatory. The premise upon which this assumption is based is "that the primary purpose of certification under Section 9 (c) is to lay the foundation for a subsequent unfair labor practice charge against the employer for a refusal to bargain, a charge which is enforceable only by the Board." The Board, therefore, argues that "it would be anomalous to require certification when the Board declines jurisdiction over the industry in unfair labor practice proceedings." (Brief, p. 24)

It is submitted that the foregoing premise that a certification proceeding is merely a preliminary step, ignores the stated intent of Congress to encourage "the practice and procedure of collective bargaining" and to protect "the exercise by workers . . . of full freedom of . . . designation of representatives of their own choosing . . ."[9]

We doubt that the Board will deny that the safeguards of an NLRB secret representation election encourages collective bargaining and protects workers' freedom of choice in accordance with those stated policies. Indeed at the time of the 1947 Taft-Hartley amendments Congress recognized that the *major* business of the National Labor Relations Board was the determination of collective bargaining representatives. Senate Report No. 105, 80th Congress, 1st Session, contains the following statement at page 10:

> "In recent years, the number of cases involving disputes with respect to the choice of bargaining repre-

[9] Section 1, Labor Management Relations Act, 1947, 29 USC 151.

> sentatives in the units which they should represent have become the major business of the National Labor Relations Board. Cases of this character for the last 4 years have been more than double the number of complaint cases. In view of the tremendous number of such cases, therefore, it is of utmost importance that the regulations and rules of decision by which they are governed be drawn so as to insure to employees the fullest freedom of choice."

Proof of the wisdom of this observation and the practical operational effect of the Act can easily be found in a comparison of the large number of certifications annually to the insignificant number of refusals to bargain processed by the Board. For example, in the fiscal year ending June 30, 1957, unions were certified as bargaining representatives in 2,942 cases.[10] During that same period, the Board found it necessary to issue only 91 remedial orders directing employers to commence bargaining.[11]

There are additional valuable rights created by a certification alone.[12] For example, a certification is a valid defense in secondary boycott cases arising under Section 8 (b) 4 (B) and (D). Further, a certification by the Board would in all probability have prevented the series of injunction suits arising in the Florida state courts in which the method of establishing majority status was a fundamental question. Nos. 5 and 6 this Term.

The Board is further in error in attempting to establish discretionary authority in 9 (c) cases from the portion of Senate Report No. 105, 80th Congress 1st Sess. which states that the change in section 9 (c) "does not change the Board's rules of decision with respect to requirements of substantiality in order to obtain a hearing." (Brief, p. 26). The

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10 *Twenty Second Annual Report*, National Labor Relations Board, Table 13, p. 172.

11 Ibid 11, Table 4, p. 164.

12 The Board recognizes the advantages of certification at p. 13 of its brief.

phrase "rules of decision with respect to substantiality" refers only to the Board rule that a petition for certification must be supported by a showing that the petitioner represents a substantial number of employees (commonly called a "showing of interest") in order that Board processes not be abused.[13] The rule has since been incorporated in the Board's *Statement of Procedure,* Series 7, Section 101.18 (a) and (b), 23 F. R. 3254. Those portions of the Senate Report relied on merely confirm that a petition filed by an individual employee under the new subsection (A) of 9 (c) (1) must also be supported by a substantial showing of interest.[14]

Finally, the Board's argument that the statute does not mean what it explicitly states because there is no legislative history in support thereof would appear to reverse a rule of construction long adhered to by the court. We submit that "the plain words and meaning of a statute cannot be overcome by legislative history which through strained processes of deduction from evidence of wholly ambiguous significance may form the dubious basis for inference in every direction. *Ex Parte Collett,* (1949), 337 U.S. 55, 61, *Gemsco, Inc.* v. *Walling,* (1945) 324 U.S. 244, 260.

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[13] For the "rules of decisions" referred to, see the following:
Atlas Powder Co., 43 NLRB 757 (1942).
Pacific Manifolding Book Co., Inc., 3 NLRB 551 (1937).
M. Lowenstein & Sons, 6 NLRB 216 (1938).
Consolidated Aircraft Corp., 7 NLRB 1061 (1938).
Swift & Co., 21 NLRB 1169 (1940).
San-Equip, Inc., 44 NLRB 524 (1942).

[14] The observations at page 10 of Senate Report 105 do not make "substantiality" applicable to the newly created right of employers to file under subsection (B), the comparable restriction on employers being that a prior demand for recognition must have been made.

At page 25 of the *Report* is the following explanation:

> "Neither of these amendments affects the present Board's *rules of decisions with respect to dismissal of petitions by reason of an inadequate showing of representation* or the existence of an outstanding collective agreement as a bar to an election. In other words, the Board could still dismiss an employee or employer's petition, if a valid contract were still in effect." (emphasis supplied)

CONCLUSION

For the reasons set forth in the Brief and Reply Brief of Petitioner, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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No. 21

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

HOTEL EMPLOYEES LOCAL NO. 255, HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION, ET AL.,

Petitioners,

v.

BOYD LEEDOM, individually and as Chairman, National Labor Relations Board, et al.

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF PETITIONER

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IN THE

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No. 21

HOTEL EMPLOYEES LOCAL NO. 255, HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION, ET AL.,

Petitioners,

v.

BOYD LEEDOM, individually and as Chairman, National Labor Relations Board, et al.

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF OF PETITIONER

OPINIONS BELOW

The opinion of the United States District Court for the District of Columbia entered on the 8th day of January, 1957 is reported at 147 F. Supp. 306, and reprinted in the record (R. 80-85). The opinion of the Court of Appeals affirming *per curiam* "on the opinion of the District Court" and the dissenting opinion of Judge Fahy are reported at 249 F. 2d 506 and reprinted in the record (R. 86-88).

JURISDICTION

The judgment and order of the Court of Appeals was entered on October 24, 1957. The petition for writ of certiorari was filed on December 13, 1957 and was granted on March 3, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

The original jurisdiction of the District Court was invoked under 28 U.S.C. 1331 in that the matter in controversy exceeded $3,000.00, exclusive of interest and costs and arose under the Constitution and laws of the United States; and also under 28 U.S.C. 2201 to declare the rights and legal relations of the parties under the Labor Management Relations Act, 1947.

The complaint alleged in substance, as to jurisdiction, that the decision and order of the National Labor Relations Board: (1) violated the constitutional guarantees of due process and equal protection under Amendment V of the Constitution; (2) was an unlawful assumption of legislative power in violation of Article I, Section 8 of the Constitution; (3) was in excess of statutory authority and especially the authority conferred by Section 9(c) of the Labor Management Relations Act, 1947; and (4) was promulgated in violation of the Administrative Procedures Act. The complaint further alleged that the Plaintiff had exhausted its administrative remedies. (R. 6-8)

The District Courts have uniformly exercised their general equity jurisdiction where the action of an administrative agency is alleged to have been in excess of statutory authority, or in violation of constitutional rights. Cf. *Inland Empire District Council, etc., et al* v. *Millis*, 325 U.S. 697, 700 (1945).

The original jurisdiction of the District Court was sustained below on authority of *Leedom, et al.* v. *International Union of Mine, Mill and Smelter Workers*, 352 U.S. 145

(1956), affirming 226 F. (2d) 780, (CA-DC, 1955); *Farmer* v. *The United Electrical Workers*, 211 F. (2d) 36 (CA-DC 1953), cert. denied 347 U.S. 943; *DePratter* v. *Farmer*, 232 F. (2d) 74, (CA-DC 1956); *Fay* v. *Douds*, 172 F. (2d) 720, (CA-2, 1949); *Air Line Dispatchers Ass'n.* v. *National Mediation Board*, 189 F. (2d) 685, 688, (CA-DC 1951); and *Kyne* v. *Leedom*, 249 F. (2d) 490, (CA-DC 1957), cert. granted 355 U.S. 922.

The exercise of the general equity jurisdiction of the District Court in the instant case is particularly appropriate, since it is the only available means of obtaining judicial review of an administrative action excluding an entire segment of the population from the coverage of the Labor Management Relations Act, 1947.[1]

The original jurisdiction of the District Court was, therefore, properly invoked.

STATUTES INVOLVED

Sections 2(2), (6), (7); 9(c), (d); 10(a), (f) of the Labor Management Relations Act, 1947 (Act of June 23, 1947, c. 120, 80th Cong., 1st Sess., 61 Stat. 136, 29 U.S.C. 151 *et seq.*); and sections 1(c); 3(a), (b), (c) of the Administrative Procedures Act (Act of June 11, 1946 Ch. 324, Sec. 2, 60 Stat. 237, 5 U.S.C. 1001 *et seq.*) are set forth in the appendix hereto.

---

[1] The General Counsel dismissed the unfair labor practice charge in the instant case because of the Board's announced jurisdictional policy (R. 6). Therefore, a review of such a policy under Sections 9(d) and 10(f) would never be possible.

The Board's questioning of jurisdiction would appear to be at odds with its announced policy in *Breeding Transfer, Inc.*, 110 NLRB 493, 495, in which the Board stated:

> "We, of course, concede that this Board, like any other quasi-judicial agency, has no authority to act capriciously or arbitrarily. This is a fundamental and wholly salutary rule of law which governs our action on jurisdiction as well as every substantive decision which we make. We have no doubt that the Courts will scrutinize our new jurisdictional policy in the light of this accepted principle of American jurisprudence."

QUESTIONS PRESENTED

1. Whether the National Labor Relations Board may, consistent with the applicable decision of this Court, exclude an entire industry from coverage of the Labor Management Relations Act, 1947 regardless of that industry's impact on commerce.

2. Whether the National Labor Relations Board has discretionary authority under Section 9(c) of the Act to refuse to assert jurisdiction when a question of representation affecting commerce exists.

3. Whether the National Labor Relations Board may, consistent with the Administrative Procedures Act and the requirements of the Fifth Amendment, establish jurisdictional rules without affording interested parties an opportunity to be heard.

INTRODUCTORY STATEMENT

The instant case is a part of the same labor controversy presently pending before this court in cases Nos. 5 and 6 October term, 1958 concerning the hotel industry in Miami and Miami Beach, Florida. In the instant case the petitioners endeavored to obtain a factual determination by the National Labor Relations Board as to their majority status as representative of the employees involved and also to obtain National Labor Relations Board intervention to prevent activities of the hotel employers in contravention of the Labor Management Relations Act, 1947. In cases Nos. 5 and 6 are set forth the results in the Florida Courts when the employees were frustrated in their peaceable attempts to secure recognition of their bargaining representative and resorted to strikes and picketing.

STATEMENT OF THE CASE

Petitioners seek a reversal of the judgment and order of the United States Court of Appeals for the District of Columbia Circuit entered October 24, 1957, affirming the judgment of the District Court granting respondents' motion for summary judgment, overruling petitioners' motion for summary judgment, and dismissing the cause.

The facts involved herein, none of which are in dispute, are as follows:

Petitioner Hotel Employees Local No. 255 is a labor organization affiliated with petitioner Hotel and Restaurant Employees and Bartenders International Union. Both the Local and the International Union represent persons employed in the hotel industry.

Petitioner Local 255 at all times mentioned in the complaint represented a majority of the employees of the hotel members of the Miami Beach Hotel Association. Petitioner Local 255 sought to obtain recognition by these hotels and the Association as the collective-bargaining representative of said employees. The hotels and the Association refused and there were 22 separate strikes by said majority of employees for recognition. (R. 24)

On June 29, 1955, a representation petition was filed with the National Labor Relations Board in accordance with section 9 (c) of the Labor Management Relations Act, 1947, and in accordance with the regulations prescribed by the Board. This proceeding was captioned *All Hotel Members of Miami Beach Hotel Association,* 10-RC-3135. The petition was dismissed on July 1, 1955, without investigation and without any determination as to whether there was a reasonable cause to believe that a question of representation affecting commerce existed. The dismissal by the Regional Director of the National Labor Relations Board was based solely on a "long standing

policy not to exercise jurisdiction over the hotel industry." (R. 13)

Petitioners appealed to the National Labor Relations Board requesting that the Board over-rule the Regional Director, order him to investigate the representation petition, hold a hearing, and proceed to an election. Three of the five Board members refused this request, stating that "The Board has decided to adhere to the long-established policy of not asserting jurisdiction over the hotel industry on the grounds set forth in *St. Louis Hotel Association*, 92 NLRB 1388". Board Member Murdock stated that he "would over-rule the Regional Director and direct that the case be sent to hearing and on the basis of a full record determine the impact of the operation of the employer herein on commerce". Board Chairman Guy Farmer stated "that the board should give consideration after hearing to modifying its policy so as to take jurisdiction on a limited basis pursuant to appropriate standards." (R. 18, 19)

Requests of petitioners for reconsideration were denied by the National Labor Relations Board on October 10, 1955, and January 27, 1956, respectively.

On July 7, 1955, during the pendency of the aforementioned representation proceedings, Local 255 filed unfair labor practice charges with the Regional Director of the Tenth Region alleging multitudinous violations of the Labor Management Relations Act (R. 35-62). These charges were held in abeyance until the decision of the Board in the representation matter at which time they were dismissed in conformity with the Board's policy on jurisdiction (complaint, par. 17, R. 6). An appeal from the dismissal of these charges was taken to the General Counsel who sustained the dismissal on the basis of the Board's aforementioned decision in the representation case, *All Hotel Members of Miami Beach Hotel Association*, 10-RC-3135 (complaint, pars 18, 19, R. 6).

The hotel industry is the 7th largest industry in the United States. Its total annual business volume in 1954 was approximately 7½ billion dollars. Over 500,000 persons are employed in the industry. It is an industry which is engaged in interestate commerce and it is an integral and necessary part of interstate transportation (R. 29).

The Miami Beach Hotel Association is a trade association having a membership of more than 150 hotels in the Miami Beach, Florida, area. The Association and its individual members are employers engaged in interstate commerce; their operations individually affect commerce; and a labor dispute with said Association or its members would tend to hinder and obstruct commerce and the free flow of commerce, all within the meaning of the Labor Management Relations Act, 1947 (complaint, par. 8, R. 3, 4).

Southern Florida has 2½ million visitors a year from other states, and a great majority of them are accommodated by the members of the Miami Beach Hotel Association. The Association member hotels, for the year ending September 1954, received over $101 million for food and lodging furnished visitors to the State of Florida. The hotel business is by far the leading industry of southern Florida. It is an integral part of interstate transportation and, during the year ending September 1954 the airlines alone transported 1,200,000 tourists to the Greater Miami area. A substantial number of these tourists came to the Association member hotels under contracts arranged outside the State of Florida for "package tour vacations" providing a single rate for travel to Miami Beach, hotel accommodations, meals, and return travel (R. 20-22).

On January 12, 1956 the complaint was filed in the U.S. District Court for District of Columbia praying for a declaratory judgment that the Board may not withold its processes and the benefits of the act on the sole grounds

that hotels are involved; that the Board's order be set aside; that the Board be directed to investigate, hold a hearing, conduct an election and certify the results, and that the Board be enjoined from withholding its processes and facilities on the sole ground that hotels are involved.

The Board filed a motion to dismiss for lack of jurisdiction, or, in the alternative, for summary judgment in its favor. The petitioners likewise moved for summary judgment in the District Court. Thus the commerce facts set forth above and alleged in the complaint and supporting affidavits are assumed to be true for the purposes of this review.

The District Court refused to dismiss for lack of jurisdiction but granted the Board's alternative motion for summary judgment on the ground that the hotel policy was not arbitrary or capricious (R. 85). The order dismissing the complaint was entered on January 16, 1957 (R. 85).

The Court of Appeals for the District of Columbia Circuit, on appeal, affirmed the judgment of the District Court *per curiam* "on the basis of the opinion of the District Court." Judge Fahy, dissenting, (R. 86-88) would have reversed the District Court, reasoning: (1) that section 9(c) of the Act was mandatory on the Board, and (2) that the exclusion of the hotel industry as a class was contrary to this Court's decision in *Office Employees* v. *NLRB*, 353 U.S. 313 (1957).

The judgment and order of the Court affirming the District Court was entered on October 24, 1957 (R. 89).

This court granted certiorari on March 3, 1958 (R. 90).

SUMMARY OF ARGUMENT

I

The refusal of the National Labor Relations Board to assert any jurisdiction over the entire hotel industry, in effect, engrafts a blanket exemption upon the Labor Management Relations Act, 1947 for hotels. This contravenes the decision of the majority of this Court in *Office Employees* v. *National Labor Relations Board*, 353 U.S. 313 (1957), since (1) hotels are employers within the meaning of section 2 (2) of the Act, and (2) the Board has excluded hotel employers as a class.

Even the minority view in *Office Employees* requires a reversal in this case because the Board's reason for excluding hotel employers as a class is not a proper reason. The Board's exclusion of the hotel industry is based on its view that when Congress enacted the Labor Management Relations Act, 1947 it adopted an existing Board policy to exclude hotels. The reason is not proper since there was no such announced Board policy in 1947 and there is no showing that Congress was aware in 1947 of any unannounced policy to exclude the hotel industry.

II

The National Labor Relations Board does not have authority to dismiss representation proceedings under section 9 (c) of the Labor Management Relations Act, 1947 when a question of representation affecting commerce exists. In 1947 Congress placed a mandatory duty on the Board in representation cases by changing the language of section 9 (c) of the Wagner Act from "may" to "shall" in the present Act.

A comparison of the present mandatory language of section 9 (c) with the discretionary language of section

10 (a), providing that the Board is "empowered" to correct unfair labor practices, shows that when Congress intended discretionary authority it so stated. Nothing in the legislative history of the Act mitigates the duty imposed by section 9 (c).

III

The Board's policy of excluding hotels and the use of pre-determined general jurisdictional standards violates the requirements of the Administrative Procedures Act, and the Fifth Amendment. The policy of excluding hotels from the coverage of the Act is a "rule", and the requirements of notice, hearing and publication required by 5 U.S.C. 1003 *et seq.* were not met in the formulation of that rule. The decision herein, based upon said rule, is therefore void.

Even if the Administrative Procedures Act did not apply, the instant decision was formulated contrary to the requirements of due process of law. The Board has never heard evidence of the effect of the entire hotel industry on commerce, and neither the petitioner nor any other interested party was given an opportunity to be heard prior to the formulation of the rule excluding hotels from the coverage of the Act. Due process is not satisfied by an administrative order issued without basis in evidence or without a hearing.

ARGUMENT

I.

THE NATIONAL LABOR RELATIONS BOARD HAS VIOLATED THE APPLICABLE DECISION OF THIS COURT BY EXCLUDING THE ENTIRE HOTEL INDUSTRY FROM COVERAGE OF THE ACT.

A. The Exclusion of the Entire Hotel Industry Contravenes the Decision of the Majority of This Court in OFFICE EMPLOYEES.

The refusal of the National Labor Relations Board to assert any jurisdiction over the entire hotel industry, in effect, engrafts a blanket exemption for hotels upon the Labor Management Relations Act, 1947. Such refusal contravenes the decision of the majority of this Court in *Office Employees* v. *National Labor Relations Board*, 353 U.S. 313 (1957). The same two basic questions are presented here that were presented in that case, namely:

1. Does the Act apply to a hotel employer, just as it does to any other employer?

2. May the Board refuse to assert jurisdiction over this entire class of employers?

1.

Section 2 (2) defines employers to whom the Act applies and specifically sets forth those classes of employers which are excluded, i.e., persons subject to the Railway Labor Act, the United States, any wholly owned government corporation, Federal Reserve banks, non-profit organizations, etc. Hotels are included within the general definition of employers and are not one of the specific exceptions.

2.

The second question here, as in *Office Employees*, is whether the Board may refuse to assert jurisdiction over this entire class of employers. This Court answered that very question in *Office Employees* by holding that an arbitrary blanket exclusion of an entire class of employers is beyond the power of the Board. The language of this Court in that regard is paraphrased in the succeeding paragraph to fit the facts in the instant case.

Here the Board has refused to assert jurisdiction over hotels as a class in the face of a clear expression of Congress as set forth in section 2 (2) and 2 (6) that the Act should be applied to all employers who "affect commerce". While it is true that this court has sustained the Board's declination of jurisdiction in certain unfair labor practice cases because the policies of the Act may not have been effectuated in that case, it has never judicially approved the Board's renunciation of jurisdiction over an entire category of employers, *i.e.*, hotels, a most important segment of American industrial life. The discretionary authority of the Board on a case by case basis to exclude employers whose business does not sufficiently "affect commerce" does not authorize the Board to assume Congress's authority to exclude all employers in a particular industry regardless of their impact on commerce. When Congress intended to make such exclusions it did so specifically.

The two-judge majority in the Court of Appeals below, consisting of Judges W. K. Miller and Bastian, ignored this Court's opinion in *Office Employees*. Judge Fahy, dissenting, held that the decision in the instant case is inconsistent with *Office Employees*. He stated as follows:

> "For in the present case the refusal of the Board to go forward was on the basis of a decision to exclude all questions of representation involving hotels. I

> think this is inconsistent with *Office Employees* v. *NLRB*, 353 U.S. 313, in which the opinion was handed down after the present case was decided by our District Court." 249 F. (2d) 507, 8 (R. 87, 88).

Although it is submitted that the majority opinion in *Office Employees* requires a reversal in this case, petitioner feels that it may be of some weight to the Court, and particularly to the minority in the *Office Employees* case, to examine the reason relied upon by the Board in declining jurisdiction over hotels. In the next section therefore, we discuss that reason.

B. Assuming Arguendo That the Board May Exlude Industries for Proper Reasons, the Board's Reason for Excluding the Entire Hotel Industry Is Not Proper.

1. The Board Excludes Hotels Because of Its Finding That Congress Intended To Exempt the Industry.

The Board has consistently based its refusal to assert jurisdiction over the hotel industry on its assumption that Congress intended to exempt the hotel industry from the Act. Such refusal is not based on any finding by it that the hotel business is of a local character. This is clearly set forth in various statements and decisions by the Board.

The reasons originally assigned by the Board for refusing jurisdiction in the instant case are set forth in its decision. (R. 18). Those reasons are:

> "The Board has decided to adhere to the long established policy of not asserting jurisdiction over the hotel industry on the grounds set forth in *St. Louis Hotel Association*, 92 NLRB 1388. Accordingly, the action of the Regional Director was warranted. Member Murdock dissents from the determination of the majority to adhere to a policy of not asserting jurisdiction

> over any hotels without regard to their impact on commerce, in accordance with his views expressed in detail in his dissent in the St. Louis Hotel Association case."

It is necessary, therefore, to examine the Board's decision in *Hotel Association of St. Louis*, 92 NLRB 1388 (1951). There was no question but that the hotels involved in that case were engaged in interstate commerce.[2]

The two-member dissenting minority stated in regard to commerce, at 92 NLRB 1391:

> "On this record, it cannot be gainsaid that the employers' operations have a substantial and important effect on interstate commerce. Indeed our majority colleagues specifically reject the employers' contention that it is not engaged in commerce within the meaning of the Act."[3]

The three-member majority of the Board in that decision relied entirely on its interpretation of congressional intent, stating at 92 NLRB 1390,

> "We do not believe that a settled policy endorsed by all those members of Congress who have recorded an opinion on the subject, should be lightly overturned by the action of this Administrative Board."

In the petition and affidavits filed in the District Court, petitioners set forth the facts establishing that the hotels involved herein are engaged in interstate commerce. (R. 19-34). The Board has never denied those facts. In fact

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[2] The employer did business amounting to over $15,000,000.00. $6,800,000.00 was received from room rentals, over $2,400,000.00 of which was received from out of state guests. In addition, the employer purchased supplies and equipment from out of state of over $800,000.00 during the year.

[3] The majority stated at 92 NLRB 1389:
". . . the Board recently announced that it would utilize certain standards . . . as a guide in determining whether or not to exercise jurisdiction . . . Were we to judge this case by those standards alone, jurisdiction should be exercised here."

the Board's counsel admitted in the courts below that these hotels are engaged in interstate commerce.[4]

As late as August 7, 1958, the Board stated as follows:

> "The Board's long standing refusal to assert jurisdiction over the hotel industry has rested on a conclusion that Congress intended to exempt the industry." 5 CCH Labor Law Reporter, par. 50,099, 42 LRR 448, 9.

This Court noted in footnote 13 of *Office Employees* v. NLRB, 353 U.S. 319, that the Board refused to assert jurisdiction over the hotel and the taxicab industry. In its latest proposed jurisdictional rules the Board does assert jurisdiction over the taxicab industry, leaving the hotel industry as the only industry which is excluded as a class.[5]

The Board has taken jurisdiction over public restaurants,[6] office buildings,[7] retail department and furniture stores,[8] ice skating rinks,[9] storage warehouses,[10] stock yards housing and feeding hogs,[11] and innumerable other establishments, none of which affect commerce more than hotels.

The Board, under its new standards, asserts jurisdiction over all retail establishments or associations, whose gross annual income is over $500,000.00, with the sole exception

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[4] The Board, in its brief below (p. 24) stated:
"• • • In the instant case it [the decision] stems from a determination that *though power exists* under all the circumstances, including the Board's limited resources, it would not effectuate the policies of the Board to exert it." (emphasis supplied).

[5] 5 CCH Labor Law Reporter, par. 50,092; 42 LRR 363.

[6] *Bickfords, Inc.*, 114 NLRB 493 (1954), *Gene Comptons Corp.* 116 NLRB 1944 (1956).

[7] *Connecticut Bank and Trust*, 114 NLRB 1293 (1955).

[8] *American Furniture Co.*, 116 NLRB 1496 (1957); *Greenberg Mercantile Co.*, 112 NLRB 710 (1955); *Bullocks, Inc.*, 119 NLRB 86 (1957).

[9] *Union News*, 112 NLRB 584 (1955).

[10] *P. V. Atlas Industrial Center*, 112 NLRB 1175 (1955).

[11] *Peoria Union Stock Yard Co.*, 116 NLRB 263 (1956). The Board apparently places greater importance on the housing and feeding of hogs than it does on the housing and feeding of humans.

of hotels. The annual gross income of the hotels involved herein far exceed $500,000.00. Under present Board rules if there were two restaurants next door to each other, but one in a hotel, each doing the same type of business and each having a gross annual income of over $500,000.00, the Board would assert jurisdiction over the one restaurant not located in the hotel, but would refuse to assert jurisdiction over the hotel restaurant, even though the hotel restaurant might be part of a mammoth chain, such as Hilton-Statler, Sheraton, Pick, Schine, etc.

In view of all of the foregoing, it is apparent that the Board's refusal to assert jurisdiction is not based on a finding that the hotel business is of a local character.

Nor is the refusal to act based on budgetary considerations. Any argument to that effect has been obviated by recent congressional action increasing the Board's budget and the Board's expansion of its jurisdictional standards.[12] It is still refusing to act in the hotel industry because of alleged congressional intent to exclude hotels.

If, therefore, the Board is in error in its conclusion that Congress intended to exempt the hotel industry the declination to assert jurisdiction is not for a proper reason.

2. There Is No Basis For a Finding of Congressional Intent To Exclude the Hotel Industry.

The Board's decision that Congress intended to exempt the hotel industry from the Act stems from an assumed approval of a Board policy to exclude hotels by Congress when it enacted the Labor Management Relations Act in 1947. The fallacy of this decision lies in the fact that (1) no such Board policy existed in 1947 or prior thereto and (2) even if such a policy existed in the minds of Board members there is not the slightest indication that Congress was aware of such a policy.

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[12] 5 CCH Labor Law Reporter, par. 50,092; 42 LRR 383

1.

In 1947 and prior thereto every reported decision by the Board demonstrated a policy to assert jurisdiction over the hotel industry.

The first reported case was *Willard Hotel*, 2 NLRB 1094, decided in 1937, wherein the Board found that the unfair labor practices complained of "affected commerce within the meaning of section 2 (6) and (7)" of the Wagner Act: In the case of *Raleigh Hotel Company*, 7 NLRB 353, 356, decided in 1938, the Board in asserting jurisdiction, stated:

> "The operation of the Company * * * has a close intimate and substantial relation to trade, traffic, and commerce within the District of Columbia and tends to lead to labor disputes burdening and obstructing commerce and the free flow of commerce."

See also *Hamilton Realty Corporation*, 10 NLRB 858 (1938); *Westchester Apartments Inc.*, 17 NLRB 433 (1939); *Rutland Court Owners, Inc.*, 44 NLRB 587 (1942); *Raleigh Hotel Co.*, 49 NLRB 777 (1943); *Parkside Hotel* (Eanet), 74 NLRB 809 (1947).

Although counsel for the Board argues that these cases arose in the District of Columbia, it is submitted that they nevertheless evidence that never, prior to 1949, did the Board consider that the Act excluded the hotel industry as an industry, nor did the Board base those decisions on the fact that the hotels were located in the District of Columbia.

The Board also cites its *Sixteenth Annual Report* as authority for the alleged policy. This report was published in late 1952, and covers the operations of the National Labor Relations Board for the year 1951. Significantly, however, diligent research of all preceding annual re-

ports fails to reveal mention of any policy of the Board refusing to assert jurisdiction over hotels. It is submitted that any policy so well and long established (as contended by the Board) would certainly merit mention in some annual report before 1952.

Not only do the decisions of the Board and the annual reports not sustain the Board's contention of policy, but it is clear that such policy was not even apparent on an administrative level within the Board itself. As late as 1949, a local union of the petitioner International filed an unfair labor practice charge against the predecessor to the association involved in the proceedings herein, to-wit, the Miami Beach Hotel Owners Association, Inc., and the Vanderbilt Hotel, a member of said association. The National Labor Relations Board, acting through the Regional Director of the Tenth Region, assumed jurisdiction over these hotel employers in Miami Beach (Case No. 10-CA-577) and issued a complaint on the 6th day of April, 1949. Thereafter, the board entered into separate stipulations and settlement agreements with each of the above employers, thereby dispensing with the necessity of formal hearing and Board order. (R. 62-80).

It is therefore apparent that as late as April, 1949, there was no known policy, even on an administrative level, which precluded the Regional Director of the Tenth Region from asserting jurisdiction over the hotel industry.

In 1949 the Court of Appeals for the District of Columbia recognized that there were no Board decisions prior to 1949 setting forth a policy to exclude hotels. That Court stated in *N.L.R.B* v. *Eanet*, 179 F. (2d) 15, 18 (fn. 1) as follows:

> "Examination of the published indexes and digests of National Labor Relations Board decisions fails to reveal any other decisions upon the policy of the Board in respect to its jurisdiction in the hotel industry, ex-

cept in the *Matter of Willard, Inc.* . . ., 2 NLRB 1094, in which the Board exercised its jurisdiction."[13]

2.

In order to establish its argument of congressional intent, the Board must not only establish that a policy to exclude hotels was in existence in 1947, but also that Congress was aware of such a policy at that time.

As pointed out above, anyone desirous of ascertaining the policy of the Board in regard to hotels in 1947 could, on the basis of all reported decisions and administrative publications, only have come to the conclusion that the Board did assert jurisdiction over hotels. There is no indication whatsoever that Congress had a special knowledge that a contrary policy might have existed in the minds of some Board members or some Board employees.

A thorough and complete search of the legislative history of the 1947 Act has revealed that there is not a single instance where any committee or sub-committee of the House or Senate, or even an individual Congressman or Senator had the slightest awareness of such a policy in 1947.[14] The Board and its counsel have been unable to make any

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[13] Judge Stevens dissenting stated at 179 F(2d) 25:

"The statement of the Board in the *White Sulphur Springs* case that it has been its administrative policy adhered to since 1935 not to assert jurisdiction over the hotel industry overlooks the exercise of jurisdiction by the Board in the instant case. Moreover I think that the Board cannot properly, under the Act, have a general policy which would forbid the exercise of its jurisdiction in a particular case where, as in the instant case, commerce is involved and where, as found in the instant case, the activities of the employer have a substantial relation to commerce and tend to lead to labor disputes burdening and obstructing such commerce and the free flow thereof."

[14] The Board below has relied on a post-enactment statement of Senator Taft to buttress its assertion. That post-enactment statement cannot be deemed an expression of Congressional intent any more than the contrary opinions of five Senators expressed on the floor of the Senate on July 20th and 27th, 1955, Congressional Record, 84th Congress, 1st Session, Volume 101, Part 9, pp 11008, 11636-39.

showing that Congress acted with such knowledge.[15] In the absence of such a showing and in the absence of any pre-1947 published decision or administrative announcement of which Congress could have been aware, it is submitted that there is no basis for a finding of congressional affirmance of a policy to exempt hotels from the operations of the act. cf. *Commissioner of Internal Revenue* v. *Glenshaw Glass Company*, 348 U.S. 426, 431 (1955).

To accept the argument of congressional approval under the circumstances set forth above would be to indulge in fanciful speculation. cf. *Peters* v. *Hobby*, 349 U.S. 331, 345 (1955).

II.

The National Labor Relations Board Does Not Have Discretionary Authority Under Section 9 (c) Of The Act To Refuse To Assert Jurisdiction When A Question Of Representation Affecting Commerce Exists.

In the instant case the National Labor Relations Board has refused to assert jurisdiction in a representation proceedings under section 9(c) of the Act, even though a question of representation affecting commerce exists. The Board's refusal to act is directly contrary to the plain mandatory language of the Act. Section 9(c) provides, in part, as follows:

> "Whenever a petition shall have been filed in accordance with such regulations as may be prescribed by the Board * * * the Board *shall* investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists,

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[15] In *White Sulphur Springs*, 85 NLRB 1487, 1488 (1949), the Board majority conceded the absence of legislative mention of the hotel industry as follows: "Indeed, the absence of mention of this industry in the hearings or debates leading to the 1947 amendments to the original Act indicates a disposition not to question or disturb the Board's policy."

> *shall* provide for an appropriate hearing upon due notice. * * * If the Board finds upon the record of such hearing that such a question of representation exists it *shall* direct an election by secret ballot and *shall* certify the results thereof." (emphasis supplied)

The question, therefore, to be determined is: assuming that the Board has reasonable cause to believe that a question of representation affecting commerce exists, may it refuse to investigate a petition for determination of representation, to provide for a hearing, to conduct an election and to certify the results thereof. It is submitted that the language of section 9(c) requires that the foregoing question be answered in the negative.

The mandatory duty of the Board in the instant case is demonstrated by a comparison of the above quoted section 9(c) and the same numbered section of the repealed Wagner Act, 49 Stat 435, which was before this Court in *Inland Empire District Council, etc. et al* v. *Millis*, 325 U.S. 697, 706, 707 (1945). The former section 9(c) read as follows:

> "(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board *may* investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under Section 10 or otherwise, and *may* take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives." (emphasis supplied)

In the *Millis* case this Court held that the language of the above quoted Section "the Board shall provide for an appropriate hearing", was mandatory but that the language

"may take a secret ballot . . ." was discretionary. Congress amended the National Labor Relations Act after the *Millis* decision and changed the word "may" to "shall" throughout section 9 (c). It is submitted, therefore, that Congress, in substituting the word "shall" for "may", intended the provisions of section 9 (c) to be thenceforth mandatory.

Also persuasive is the fact that the language of the present section 9 (c) is materially different from section 10 (a), 61 Stat 146, 29 USC 160 (a), which provides for the correction of unfair labor practices. Section 10 (a) provides in part:

> "The Board is *empowered*, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce." (emphasis supplied).

Thus where Congress intended discretionary authority, it so stated by using the specific language "empower". When it intended to impose an unqualified obligation it used the word "shall". Consistent with this distinction, the cases relied on by the Board in support of its alleged discretionary authority[16] relate to unfair labor practices arising under the above quoted section 10 (a).

Judge Fahy, dissenting below, concurred in the foregoing argument as follows:

> "The Act says that the Board shall take jurisdiction of questions of representation affecting commerce. The verb "shall" was incorporated into section 9 (c) by the Taft Hartley Act in place of "may" in the older Wagner Act. The language is also to be contrasted with that relating to unfair labor practice cases, where the Board is not required to file a complaint but is 'empowered' to do so."

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[16] *NLRB* v. *Denver Building Council*, 341 U.S. 675 (1950); *NLRB* v. *Stoller*, 207 F.(2d) 305 (CA 9-1953); *NLRB* v. *Townsend*, 185 F.(2d) 378 (CA 9-1950); *Optical Workers* v. *NLRB*, 227 F.(2d) 687 (CA 5-1955).

The Board has argued that it was not the intent of Congress to impose a mandatory duty on the Board under section 9(c) "in all cases affecting commerce." However, the language of the instant section and specifically the word "shall", is clear and subject to no ambiguity. This Court has consistently adhered to the canon that where statutory language is clear, there is no need to refer to the legislative history. *Ex Parte Collett*, 337 U.S. 55, 61 (1949). In any event, however, there is no congressional expression obviating the positive duty imposed by the language of the statute.[17] It must therefore be assumed that the plain language of the statute represents the intent of Congress.

The Board argument that a mandatory directive under section 9(c) is inconsistent with discretionary authority under section 10(a) is without merit. Congress might quite properly have decided that the Board shall not have discretion to refuse to make *factual* determinations of bargaining status under section 9(c). Conversely, Congress quite properly may have felt that in unfair labor practice cases necessarily involving penalties and the equitable remedy of injunctive relief, the Board and General Counsel should have discretion to prosecute or not to prosecute in the light of the equities of the particular situation, just as prosecuting attorney may decide to prosecute or not to prosecute.[18]

This Court has made clear in recent cases that state courts and agencies may not act in labor relations matters

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[17] The Board cited below *Senate Report 105, 80th Congress, First Session*, pp. 10, 25; 93 Cong. Rec. 4143, as an explanation of the present language of Sec. 9(c). Those portions of the Report cited are inapposite as they deal only with the desire of Congress to permit employers and non-union employees alike to request elections. The Report clearly evidences that the amendment to section 9(c) to include subsections (1), (A) and (B) specifically provided this right, but in no way mitigated the clear meaning of the mandatory language previously referred to.

[18] e.g.: The announced policy of the General Counsel not to enforce the reimbursement penalty of *Matter of Brown-Olds Co.*, 115 NLRB 594 (1956), against unions which conform their contracts to the requirements of Section 8(a) (3) of the Act by September 1, 1958. 42 LRR 9.

affecting commerce covered by the Labor Management Relations Act, 1947, even though the National Labor Relations Board has declined to exercise its jurisdiction.[19] It was argued in those cases that such a holding by this Court would result in the creation of a "no man's land".

The alleged "no man's land", however, is a creation of the Board which is not supported by any expression of Congressional intent. Nothing in the legislative history of the act shows an intent by Congress to confer upon the Board authority to exempt entire industries, or segments of industries from the Labor Management Relations Act, 1947. Further, the legislative history of the Act does not show an intent to grant the Board authority to determine whether or not labor relations of thousands of employers and millions of employees are to be governed by Federal law or to remain entirely ungoverned. This, however, is the result of the Board's present practices.

It is respectfully submitted that the Board's adherence to its statutory duty under section 9(c) will substantially reduce, if not eliminate, a major portion of the so-called "no man's land".

III.

The National Labor Relations Board May Not, Consistent With The Administrative Procedures Act And The Requirements Of The Fifth Amendment, Establish Jurisdictional Rules Without Affording Interested Parties An Opportunity To Be Heard.

If we assume that in certain instances the Board may formulate jurisdictional rules, the validity of the present method of formulation of these rules or standards is subject

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[19] *Guss* v. *the Utah Labor Relations Board*, 353 U.S. 1; Amalgamated *Meat Cutters* v. *Fairlawn Meats*, 353 U.S. 20; *San Diego Building Trades Council* v. *Garmone*, 353 U.S. 26.

to considerable doubt. The Board's jurisdictional rules involved herein were announced in press releases or in individual cases in which the facts were limited to the particular representation question involved.

The Administrative Procedure Act

The jurisdictional rules of the Board whether announced by decision or press release, clearly implement, interpret, and prescribe law or policy, have a future effect, and are of general and particular applicability. They are not interpretive guides developed on a case-by-case basis but rather they are absolute prescriptions to Board agents, as to the future applicability of the Labor Management Relations Act. Accordingly, it is submitted that the jurisdictional standards are "rules" within the meaning of section 1 (c) of the Administrative Procedures Act, 60 Stat. 237, 5 U.S.C 1001 (c). cf. *Columbia Broadcasting System* v. *United States,* 316 U.S. 407, 422 (1942).

There is no claim by the Board that any of its jurisdictional rules, including the exclusion of hotels, have been promulgated in compliance with the notice, hearing and publication requirements of section 3 of that Act, 60 Stat. 239, 5 USC 1003. The Board excuses this omission by pointing out that petitioner had full opportunity to be heard in the instant case. We submit that the Board must follow the law and not what it considers to be an adequate substitute.

Due Process

If we assume that the Administrative Procedures Act does not apply, then accepted judicial procedure and the rudiments of fair play and the due process clause require that parties affected by the formulation of jurisdictional standards be given an opportunity to be heard and to

present evidence as to whether or not any particular proposed jurisdictional rule does in fact effectuate the purposes of the Act. The decisions of this Court have clearly contemplated that jurisdictional issues would be determined on a case by case basis, affording parties an opportunity to be heard. *Consolidated Edison Co. of New York* v. *NLRB, et al.*, 305 US 197 (1938); *Santa Cruz Packing Co.* v. *NLRB*, 303 US 453 (1938); *Office Employees* v. *NLRB*, 353 U.S. 313, 318 (1957).

The history of the formulation of the instant hotel rule demonstrates the Board's disregard of due process. The hotel policy was first adopted in *White Sulphur Springs, Inc.*, 85 NLRB 1487 (1949). The evidence in *White Sulphur Springs* was confined to the operation of the Greenbriar Hotel and the only parties to the proceeding were a small independent union of firemen and policemen and a subsidiary of the Chesapeake & Ohio Railroad. Yet the decision affected every hotel and every hotel employee in the United States. Again in *Hotel Association of St. Louis*, 92 NLRB 1388 (1951), the evidence was limited to the operation of that association. In the instant case the Board's decision was based solely upon "policy" without reference to facts. Due process is not satisfied by such a procedure.[20]

We earnestly and respectfully submit that the National Labor Relations Board has ignored the requirements of

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[20] Mr. Justice Frankfurter's comment contained in his concurring opinion in *Anti-Facist Committee* v. *McGrath*, 341 U.S. (1951) 165 is particularly apposite.

> "The construction placed by the Court upon legislation conferring administrative powers shows consistent respect for a requirement of fair procedure before men are denied or deprived of rights. From a great mass of cases, running the full gamut of control over property and liberty, there emerges the principles that statutes should be interpreted, if explicit language does not preclude, so as to observe due process in its basic meaning."

the Administrative Procedures Act and has shown no respect for the requirements of due process.

CONCLUSION

For the reasons set forth above, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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APPENDIX

STATUTES INVOLVED

The relevant portions of the Labor Management Relations Act, 1947, (Act of June 23, 1947, c. 120, 80th Cong., 1st Sess., 61 Stat. 136, 29 U.S.C. § 151, *et seq.*) provide as follows:

Sec. 2 * * *

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia, or any Territory of the United States and any State or other Territory, or between any foreign country, and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

Sec. 9.

(c) (1) Whenever a petition shall have been filed, in accordance with such regulation as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employee (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section (a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9 (a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9 (a):

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of

representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

"(d) Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

Sec. 10.

(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise; **Provided,** That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provisions of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

"(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying for the order of the Board to be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered, and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact it supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

The relevant portions of the Administrative Procedures Act, (Act of June 11, 1946, ch. 324 § 2, 60 Stat. 237, 5 U.S.C. § 1001, *et seq.*) provide as follows:

Sec. 1001. Definitions. * * *

(c) Rule and rule making.

"Rule" means the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or

prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing upon any of the foregoing. "Rule making" means agency process for the formulation, amendment, or repeal of a rule.

Sec. 1003. Rule making.

Except to the extent that there is involved (1) any military, naval, or foreign affairs function of the United States or (2) any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts—

(a) Notice; publication and contents.
General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except where notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are

impracticable, unnecessary, or contrary to the public interest.

(b) Procedures.
After notice required by this section, the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner; and after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose. Where rules are required by statute to be made on the record after opportunity for an agency hearing, the requirements of sections 1006 and 1007 of this title shall apply in place of the provisions of this subsection.

(c) Time of publication or service of rules.
The required publication or service of any substantive rule (other than one granting or recognizing exemption or relieving restriction or interpretative rules and statements of policy) shall be made not less than thirty days prior to the effective date thereof except as otherwise provided by the agency upon good cause found and published with the rule.

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In the Supreme Court of the United States

OCTOBER TERM, 1957

HOTEL EMPLOYEES LOCAL NO. 255, HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION, ET AL., PETITIONERS

v.

BOYD LEEDOM, INDIVIDUALLY AND AS CHAIRMAN, NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 662

HOTEL EMPLOYEES LOCAL NO. 255, HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION, ET AL., PETITIONERS

v.

BOYD LEEDOM, INDIVIDUALLY AND AS CHAIRMAN, NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (Pet. App. 25–26) is not yet reported. The opinion of the district court (Pet. App. 27–33) is reported at 147 F. Supp. 306.

JURISDICTION

The judgment of the court below (Pet. App. 27) was entered on October 24, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the Board's action in declining to assert jurisdiction over cases involving employer-employee relations in the hotel industry was a valid and proper exercise of its statutory discretion.[1]

2. Whether the Board's action in this case satisfies the requirements of the Administrative Procedure Act and due process.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151, *et seq.*) and of the Administrative Procedure Act (60 Stat. 237, 5 U. S. C. 1001, *et seq.*) are set forth at Pet. 3–8.

STATEMENT

I. Proceedings before the board

On June 29, 1955, Local 255 filed a representation petition under Section 9 of the Act with the Board's

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[1] The court below affirmed the judgment of the district court dismissing the complaint on the ground that the Board's declination of jurisdiction was a proper exercise of the Board's statutory discretion. Both courts, however, rejected the Board's alternative position that the complaint should have been dismissed in the first instance for want of jurisdiction in the district court to review a Board determination made, as here, in a representation proceeding. In the event this Court should grant certiorari, the Board desires to preserve this alternative contention as a basis for sustaining the judgment below. See *Langnes* v. *Green*, 282 U. S. 531, 535–539; *Walling* v. *General Industries Co.*, 330 U. S. 545, 547. The considerations generally applicable to this issue are set forth in the petition for a writ of certiorari in *Leedom* v. *Kyne*, No. 633, this Term, certiorari granted January 13, 1958, where a similar question is presented.

Regional Director for the Tenth Region (J. A. 3). In that petition Local 255 requested certification as bargaining representative of the employees of the hotels comprising the Miami Beach Hotel Association, a trade association of hotels in Miami Beach, Florida (J. A. 2). On July 1, 1955, the Board's Regional Director, after affording Local 255 an opportunity voluntarily to withdraw its petition, entered an order of dismissal stating in relevant part (J. A. 11):

> On October 26, 1954, the Board issued its Decision and Order in the *Virgin Isles Hotel, Inc.,* Case (110 NLRB No. 65) supplementing its recently announced standards for the assertion of jurisdiction and reiterating its long standing policy not to exercise jurisdiction over the hotel industry. Consequently, it does not appear that further proceedings are warranted inasmuch as it will not effectuate the policies of the Act to assert jurisdiction in this case.

Local 255, advised by the Regional Director of its right to obtain Board review of his order of dismissal, sought and obtained such review (J. A. 10). Briefs were submitted and oral argument was held on August 9, 1955 (*ibid.*). On August 26, 1955, the Board, one member dissenting, issued its determination sustaining the Regional Director's dismissal in accordance with its "long-established policy of not

asserting jurisdiction over the hotel industry * * *'' (J. A. 16–17).[2]

Subsequent motions for reconsideration filed by Local 255 on September 9, 1955, and January 27, 1956, were denied (J. A. 4).[3]

II. The instant suit

On January 12, 1956, Local 255 and its parent International, petitioners herein, instituted the present action in the district court (J. A. 1). The gravamen of their complaint was that the Board, in dismissing the representation petition filed by Local 255, "deprived the plaintiffs and their members of their right to participate in elections and other proceedings before the National Labor Relations Board * * * and of their constitutional and statutory right to organize and represent employees in the hotel industry" (J. A. 6–7). More specifically, petitioners asserted that the Board's dismissal of the representation petition violated the constitutional guarantees of due process and

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[2] Guy Farmer, then chairman of the Board, concurred in the Board's disposition of the instant case but suggested that the Board consider modifying its policy so as to take jurisdiction over the hotel industry on a limited basis pursuant to appropriate standards (J. A. 17). Member Murdock, the fifth Board member, dissented on the grounds he had previously stated in *Hotel Association of St. Louis*, 92 NLRB 1388, where the Board had likewise adhered to past precedent by declining to assert jurisdiction over the hotel industry—on that occasion, however, with the approval of the union which is urging reversal here.

[3] During this period also, the General Counsel, citing the Board's determination in the representation proceeding, sustained the Regional Director's refusal to proceed upon unfair labor practice charges filed by members of Local 255 against members of the Association (J. A. 4–5).

equal protection under the Fifth Amendment; violated Article I, Section 8 of the Constitution in that it constituted an assumption of legislative power; was in excess of the authority conferred upon the Board by Section 9 (c) of the Act; and was promulgated in violation of Section 4 of the Administrative Procedure Act (5 U. S. C. 1003 (J. A. 5–6)). On the basis of these allegations, petitioners asked for a declaratory judgment and injunctive relief to compel the Board to process the representation petition and to enjoin the Board from withholding its processes "on the sole ground that it does not effectuate the policies of the Act to assert jurisdiction over hotels" (J. A. 7–8).

The Board members, respondents herein, moved to dismiss the complaint or, in the alternative, for summary judgment in their favor on the ground that the district court lacked jurisdiction of the subject matter and on the further ground that the complaint failed to state a claim warranting judicial relief (J. A. 8–9). Petitioners, in turn, filed a cross motion for summary judgment in their favor (J. A. 51).

On January 8, 1957, the district court (Morris, J.) issued its opinion (Pet. App. 27–33). At the outset the district court observed (Pet. App. 29):

> The question of whether action, preliminary to unfair labor practice proceedings under Section 10 of the Act, plainly beyond the scope of statutory authority, whether by way of departure from statutory requirements or from those of due process of law, may be reviewed by the District Court in the exercise of its equity

> power has been decided for this jurisdiction in the case of *Farmer* v. *The United Electrical Workers*, 93 U. S. App. D. C. 178, 211 F. 2d 36; see also *DePratter* v. *Farmer*, decided by our Court of Appeals, February 2, 1956 [232 F. 2d 74], *Fay* v. *Douds*, 172 F. (2d) 720 (2d Circuit), and *Leedom, et al.* v. *International Union of Mine, Mill and Smelter Workers*, S. Ct. No. 57, decided December 10, 1956 [352 U. S. 145].

The district court then directed its attention to the question whether the Board's action was in excess of its statutory authority or violated due process requirements. As to the latter, the district court rejected petitioners' claim of prejudice for lack of a hearing. The court noted that petitioners, pursuant to permission granted by the Board upon review of the Regional Director's dismissal, had briefed and orally argued before the Board that existing circumstances warranted a departure from the Board's policy, theretofore endorsed by petitioners, of not asserting jurisdiction over employer-employee relations in the hotel industry in the several states (Pet. App. 30).[4]

On the question of the Board's statutory authority, the district court noted that Congress had lodged in the Board and not in the courts the determination as to what employer-employee relations so affect

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[4] As petitioners acknowledge (Pet. 9, 12), no issue of fact was involved. Accordingly, neither the National Labor Relations Act nor the Constitution required a hearing for the introduction of evidence. *Fay* v. *Douds*, 172 F. 2d 720, 725 (C. A. 2).

commerce as to require the assertion of its jurisdiction and, that absent arbitrariness or caprice, such a determination was within the Board's discretion (Pet. App. 30–31). Reviewing the history of the Board's jurisdictional policy respecting the hotel industry and available Congressional comment thereon, the court concluded that the Board's determination in the instant case could not be regarded as arbitrary or capricious (Pet. App. 31–33). Accordingly, the district court granted respondents' motion for summary judgment and denied petitioners' cross-motion for summary judgment (Pet. App. 33). The court entered its order dismissing the complaint on January 16, 1957 (*ibid.*).

Petitioners appealed from the judgment of the district court. Respondents reiterated their defense that the district court lacked jurisdiction of the subject matter of the action and that, even assuming such jurisdiction to exist, the dismissal of the complaint was proper. The court below, one judge dissenting, affirmed "on the opinion of District Judge Morris, 147 F. Supp. 306" (Pet. App. 25–26).

ARGUMENT

1. Assuming that the district court had jurisdiction in the first instance to review the Board's determination (but see fn. 1, *supra*, p. 2), its dismissal of petitioners' complaint was proper and the affirmance of that dismissal by the court below does not call for review.

Petitioners do not challenge the well-settled proposition that the Board has discretion in the interest

of better effectuating the policies of the Act to assert less than the full measure of its permissible jurisdiction. *National Labor Relations Board* v. *Denver Bldg. & Construction Trades Council*, 341 U. S. 675, 684. They urge, however, as a principal basis for invoking review by this Court, that this discretion is limited to unfair labor practices under Section 10 of the Act and does not exist where, as here, a representation proceeding under Section 9 of the Act is initiated (Pet. 12–16). In this connection, petitioners point out that under Section 10 (a) of the Act, the Board is "empowered" to prevent the commission of unfair labor practices whereas Section 9 (c) states that upon the filing of a representation petition "the Board *shall investigate* such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists *shall provide for an appropriate hearing upon due notice*" (emphasis added). Petitioners also note that Section 9 (c) of the Act prior to its amendment in 1947 was phrased in permissive terms[5] and that the change to "mandatory" language signified Congress' intent that the Board exhaust its jurisdiction in the representation field.

Petitioners' suggested reading of Section 9 (c), however, is not required by the literal language of that provision, finds no support in legislative history,

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[5] Section 9 (c) of the original Act read:

"Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy * * *. In any such investigation, the Board shall provide for an appropriate hearing upon due notice * * *."

and would lead to anomalous results obviously not intended by Congress and wholly at odds with prevailing judicial authority. Thus, although the Board is required by the language of Section 9 (c) to "investigate" all representation petitions, it is required to proceed further only where it has "reasonable cause to believe that a question affecting commerce exists * * *." In making this preliminary determination the Board has been guided by such considerations as the effect of the employer's operations upon commerce, the furtherance of the policies of the Act and, in the case of a petitioning labor organization, the number of adherents among the employees whom the labor organization seeks to represent. The courts, both before and after the 1947 amendments to the Act, have uniformly approved the Board's practice in this regard.[6] In this way both the administrative agency and the courts implement the basic policy of the Act which Congress declared in Section 1 of the Act to be the elimination of "the causes of certain *substantial* obstructions to the free flow of commerce * * *." (Emphasis added.)

Moreover, the total absence of relevant comment in the copious legislative history accompanying the

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[6] See for example, *Bethlehem Steel Co.* v. *New York State Labor Relations Board*, 330 U. S. 767, 770; *Packard Motor Car Co.* v. *National Labor Relations Board*, 330 U. S. 485, 492–493; *Optical Workers' Union* v. *National Labor Relations Board*, 227 F. 2d 687 (C. A. 5), rehearing denied, 229 F. 2d 170, certiorari denied, 351 U. S. 963; *Kearney & Trecker Corp.* v. *National Labor Relations Board*, 209 F. 2d 782, 787 (C. A. 7), and cases there cited. Cf. *Herzog* v. *Parsons*, 181 F. 2d 781 (C. A. D. C.), certiorari denied, 340 U. S. 810.

1947 amendments militates against the view that Congress intended so drastic a change in the Board's settled practice respecting its handling of representation cases. Petitioners cite no reference—and we are aware of none—suggesting that Congress entertained such an intent. Indeed, such references as are germane indicate that the amended language of Section 9 (c) "does not change the Board's rules of decision with respect to requirements of substantiality in order to obtain a hearing" but were designed merely to accord to employers and non-union employees the same right of petition enjoyed by unions. Sen. Rep. No. 105, 80th Cong., 1st Sess., pp. 10, 25; 93 Cong. Rec. 4143. Finally, it seems inconceivable that Congress would compel the Board to assert jurisdiction in every representation case, however minimal its impact upon commerce or its relation to the effectuation of the overall statutory policy, while permitting the Board at the same time to utilize those considerations as a basis for limiting its assertion of jurisdiction in unfair labor practice cases which frequently involve the same issues.[7]

2. Contrary to petitioners' claim (Pet. 16–21), the Board's determination not to assert jurisdiction over the hotel industry is neither arbitrary nor in conflict

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[7] For example, the Board would be required to issue certifications in representation cases where valid considerations would dictate that it not expend its energies in unfair labor practice proceedings brought to police those certifications. Similarly, the Board could under appropriate circumstances decline to entertain refusal to bargain cases where questions of representation were at issue but would be required to resolve those same questions if they were raised in representation cases.

with the ruling of this Court in *Office Employes Union* v. *National Labor Relations Board,* 353 U. S. 313. The Board's practice in this regard had its inception early in the days of the original Act. *White Sulphur Springs Co.,* 85 NLRB 1487, 1488 ("To assert jurisdiction here would be to reverse Board precedent untouched since the original Wagner Act was enacted 14 years ago."); *Hotel Association of St. Louis,* 92 NLRB 1388, 1389–1390; National Labor Relations Board, *Sixteenth Annual Report* (U. S. Gov't Print. Off., 1952), pp. 38–39. See also *National Labor Relations Board* v. *Eanet,* 179 F. 2d 15, 17–18 (C. A. D. C.); *Phillips Petroleum Co.* v. *National Labor Relations Board,* 206 F. 2d 26, 28–30 (C. A. 5).[8] The Board's underlying rationale was that the essential function of the hotel industry, namely, the furnishing of lodging for its customers while they are on the hotel premises, is local and has relatively slight impact upon interstate commerce. *Hotel Association of St. Louis, supra.* Senator Taft, as the opinion of the district court discloses (Pet. App. 31–32), was of the same mind and indicated that in his view it had not been the intention of the Committee of Labor and Public Welfare in 1947 "to broaden or extend the jurisdiction of the Board in

[8] Petitioners correctly note (Pet. 16, n. 5) that the practice has its exceptions. Thus, the Board, exercising a plenary jurisdiction in the District of Columbia, has always asserted jurisdiction over hotels located there. Similarly, the Board has, until recently, asserted jurisdiction over hotels located in the Territories. See *The Virgin Isles Hotel,* 110 NLRB 558.

that respect."[9] Moreover, the Board's practice has had the full support not only of the hotel industry but, until the instant case, of the International, petitioner herein, the largest labor organization in the industry. *Hotel Association of St. Louis, supra.* Under these circumstances where the Board's long-settled practice respecting the hotel industry has received endorsement from both Congressional and judicial authority as well as the support of the principals most directly affected, there is little warrant for a claim that the Board's action is arbitrary or capricious.[10]

Office Employes Union v. *National Labor Relations Board* is not dispositive of the instant case as the opinion plainly discloses. 353 U. S. at 320, fn. 13.

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[9] For other manifestations of legislative approval of the Board's practice respecting the hotel industry, see Hearings before the Subcommittees of the House Committee on Education and Labor and of the House Committee on Expenditures in the Executive Departments, 80th Cong., 2d Sess., pp. 2–9, 37–41 (May 7, 1948); H. Rep. No. 2050, 80th Cong., 2d Sess., pp. 2–5. See also Hearings before the Senate Committee on Labor and Public Welfare on S. 55 and S. J. Res. 22, 80th Cong., 1st Sess., Part 4, pp. 2343–2344 (March 13, 1947) where the Committee's attention was directed to the Board's consistent policy respecting the hotel industry and amendments were proposed to change that policy.

[10] Petitioners point out (Pet. 3) that the instant case is part of the same controversy which is presently pending before this Court in cases Nos. 363 and 364, this Term, concerning the hotel industry in Miami and Miami Beach, Florida. Implicit in this reference would seem to be the suggestion that this Court should grant certiorari in the instant case in order that the whole controversy be presented before it. The suggestion is not well-founded. Assuming, *arguendo*, that the Florida courts erroneously regulated labor relations matters properly within the Board's jurisdiction, that error is remediable independently of the disposition of the instant case. Compare *Guss* v. *Utah Labor Relations Board*, 353 U. S. 1; *Garner* v. *Teamsters Union*, 346 U. S. 485.

In that case the Board, contrary to its previous practice, declined to assert jurisdiction over unions acting as employers in their normal functions for the reasons which had prompted the Board to refrain from asserting jurisdiction over non-profit organizations, for example, religious and educational institutions. This Court concluded, however, that the language of Section 2 (2) of the Act, specifically including labor organizations within the definition of the term employer subject to the Act, and its legislative history unequivocally compelled the conclusion that the Board's "arbitrary blanket exclusion of union employers as a class is beyond the power of the Board" [11] and that the Board could not justify such a result by the "unrealistic" analogy to religious and educational institutions (*id.* at 318–319). These considerations are not present here. Moreover, the underlying reasons for the Board's action in the instant case distinguish the hotel situation from the hypothetical situations posed by petitioners of a declination of jurisdiction in the steel, automotive and electrical industries.

3. Petitioners' further contention that the Board's action fails to satisfy the requirements of the Administrative Procedure Act and of due process presents no question appropriate for review in the instant case. As the district court observed (Pet. App. 30, *supra,* p. 6), petitioners were accorded full

[11] *Joliet Contractors Association* v. *National Labor Relations Board*, 193 F. 2d 833, 841 (C. A. 7), also relied upon by petitioners (Pet. 19), is based upon similar considerations applicable to secondary boycotts in the building and construction industry.

opportunity to be heard as to the propriety of the Board's declination of jurisdiction in the instant case,[12] and petitioner International, parent of petitioner Local 255, was likewise a full participant in the Board's earlier determination in the *Hotel Association of St. Louis* case. Finally, it is clear that the provisions of the Administrative Procedure Act were not intended to negate the familiar power of administrative agencies to develop and enunciate policies and interpretations on a case by case basis. *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U. S. 194.

CONCLUSION

The petition for a writ of certiorari should be denied.

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[12] As already noted, fn. 4, *supra*, p. 6, the relevant facts were not in issue.

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v.

BOYD LEEDOM, individually and as Chairman, National Labor Relations Board, et al., *Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF AMERICAN HOTEL ASSOCIATION *AMICUS CURIAE*

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BRIEF OF AMERICAN HOTEL ASSOCIATION *AMICUS CURIAE*

The Interest of the *Amicus Curiae*

This brief is submitted on behalf of the American Hotel Association *amicus curiae* with the written consent of both the petitioners and the respondent.

The American Hotel Association is a membership trade association with offices at 221 West 57th Street, New York City and Wyatt Building, Washington, D. C. Its members are state hotel associations which are

located in every state of the United States as well as in Canada, Hawaii, Mexico, Puerto Rico and other islands of the West Indies. These state and territorial hotel associations presently have a membership of 5424 hotels with a total of 611,543 rooms. These hotels range from very small establishments located in villages to large commercial hotels in cities. The membership also includes residential hotels and resort hotels.

The present proceeding is of direct and immediate interest to every hotel in the American Hotel Association which is located within the United States or its territories. The primary issue in the proceeding is the contention of the petitioners that the National Labor Relations Board cannot continue its long-established policy of refusing to assert jurisdiction in labor disputes involving hotels. The Court's decision in this proceeding will have a direct bearing upon the labor relations practices of every hotel in the Association.

When the present petitioner, Hotel Employees Local No. 255, was given a full hearing in the matter by the National Labor Relations Board in August, 1955 the American Hotel Association was allowed to appear before the Board and present its position. The American Hotel Association did not participate in the subsequent proceedings in the District Court or in the Court of Appeals.

The history of the proceedings are set forth in detail in petitioners' brief and will not be repeated here. The petitioners have pointed out that the proceedings originated in their efforts to obtain recognition by Miami Beach hotels as the collective bargaining representative of employees in such hotels and that upon refusal to recognize the petitioners, there were twenty-two

separate strikes by the employees. The additional statement should perhaps be made here that since the commencement of the proceedings, many of the Miami Beach hotels have signed collective bargaining agreements with the petitioner Local No. 255.

The position taken by the petitioner Hotel & Restaurant Employees and Bartenders International Union in this proceeding is the reverse of the position which it took in *Hotel Association of St. Louis,* 92 N. L. R. B. 1388 (1951), at which time it urged the Board not to take jurisdiction of hotel cases.

It should also be pointed out that at the oral argument before the National Labor Relations Board, counsel for the Miami Beach Hotel Association pointed out that that Association was not the collective bargaining representative of the hotel employers and that many of the hotels named in the original petition were not members of that Association.

Argument

1. The Decision of This Court in the Office Employees Case Is Not Controlling

In *Office Employes Union* v. *National Labor Relations Board,* 353 U. S. 313 (1957), this Court held that the Board was not authorized to refuse jurisdiction of a labor dispute solely because the employer was a labor union. An examination of the decision in that case discloses substantial differences from the situation in the present proceeding in two material respects: First, the refusal by the Board to take jurisdiction in the *Office Employes* case represented a reversal of an established policy of the Board theretofore in effect. Second,

it was directly contrary to the affirmative action taken by Congress to bring unions under the Act. This Court found that the question of exempting labor unions completely from the provisions of the Act had been presented to Congress on two occasions but that instead of exempting such labor unions when acting as employers, Congress had specifically included them within the definition of "employer" in Section 2(2) of the Act.

In refusing to take jurisdiction in the *Office Employes* case, the Board treated labor unions as analogous to certain other nonprofit organizations over which the Board had refused to exercise jurisdiction. This Court found that such analogy was unwarranted, particularly in the face of clear Congressional intent that unions as employers were not to be an exempt class. The opinion also points out that the Congressional Committee Report expresses an intent that certain other nonprofit organizations were considered outside of the coverage of the Act in most cases. Where Congress specifically treats two separate groups of employers in two different ways, the Board could not make one analogous to the other. It is clear that the Board cannot treat all "labor union as employer" cases as a class and decline jurisdiction solely because a case falls within such class. However, we do not read the *Office Employes* decision as holding that the Board can never refuse jurisdiction over some other class or group of employers if valid reasons exist for such refusal.

The present proceeding presents a completely different situation. Here we find an established policy of the Board in effect since the creation of the Board in 1935 not to take jurisdiction of hotel cases generally on the ground that it would not effectuate the policies

of the Act. In the present case we find no Congressional action disapproving this policy. On the contrary, we submit that there is substantial evidence that Congress approved it. The Board did not base such refusal on the ground that the hotels were analogous to any other class of employers but on the well-founded belief that Congress believed that labor disputes in hotels generally did not have a substantial effect on commerce. For these reasons, the decision of this Court in the *Office Employes* case is not controlling.

2. The Board's Long-Standing Policy of Declining Jurisdiction in Hotel Cases Has Been Approved by Congress

The power of the Board to decline jurisdiction upon the grounds that it would not effectuate the policies of the Act has been sustained by this Court.[1] There is nothing in the Act which requires the Board to implement this policy on a case-by-case basis. The Board has long recognized the impracticality of receiving petitions in every labor dispute, no matter how unsubstantial may be their effect on commerce or however unimportant to the national welfare, only to dismiss the great majority of such petitions upon the ground that in the particular case it would not effectuate the policies of the Act. Instead, the Board very sensibly adopted from time to time rules or standards or practices which are published and which act as a guide to persons involved in labor disputes. In the case of hotel employers generally, this policy has been long-standing and constant. It has been supported and even urged in the present proceeding by the petitioner Hotel & Restaurant Employees and Bartenders International

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[1] *N. L. R. B.* v. *Denver Building & Construction Trades Council*, 341 U. S. 675 (1951).

Union.[2] The policy of declining jurisdiction in hotel cases generally was known to and approved by Congress which has refused to approve amendments to the Act which would have reversed or compelled reversal of its policy.

The petitioners in the present proceeding urge that the Board had no such policy prior to its decision in *Hotel Association of St. Louis* which was decided in 1951. In the courts below and here they urge that Congress could not have approved the Board policy (of declining jurisdiction) in 1947 when it enacted the Labor Management Relations Act because no such Board policy existed in 1947 or prior thereto or was called to the attention of Congress.

This contention of the petitioners must fall for two reasons: First, it is contrary to their own statement made to Congress in 1947 describing such policy and, second, Congress then refused their suggestion that the law be amended to direct the Board to take jurisdiction of hotel cases. At the hearings before the Senate Committee on Labor and Public Welfare, Mr. Charles E. Sands, educational representative of the Hotel & Restaurant Employees International Alliance and Bartenders International League of America,[3] made a statement on March 13, 1947. His comment appearing in the official record of these hearings includes the following:

> "The National Labor Relations Board over the years has investigated many hotel labor disputes,

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[2] In *Hotel Association of St. Louis*, 92 N. L. R. B. 1388 (1951), the petitioner Hotel & Restaurant Employees and Bartenders International Union intervened and specifically urged the Board to continue its established policy of declining jurisdiction in hotel cases.

[3] Apparently the former title of one of the present petitioners or in some way affiliated with it. Both were represented by the same counsel in *Hotel Association of St. Louis*,

> but has up to this time never accepted jurisdiction in such cases."[4]

In the face of this statement on behalf of one of the petitioners (or its affiliate), it cannot now be argued by that petitioner that the Board did not have an established policy in hotel cases generally prior to 1947.

At the same hearing Mr. Sands submitted an opinion from an attorney suggesting that a specific direction from Congress would probably be necessary to get the Board to take jurisdiction in hotel cases, using the following language:

> "To accomplish this we suggest an amendment to section 1 which is concerned with the findings and policy of the act. We would suggest that after section 1 (c) a section be inserted which would provide: 'Affecting, restraining or controlling the movement of persons travelling in interstate commerce.' Such an amendment would amount to a specific direction to the National Labor Relations Board that it was the intent of Congress to make the act applicable to hotels."

In the face of these statements made by its affiliate, it is surprising that one of the petitioners can now urge that there was no such Board policy prior to 1947 or that Congress was unaware of such policy at that time.

For the present argument it is enough to point out that Congress refused to approve such amendment. These quotations demonstrate three things: First, that the petitioners recognized as early as 1947 the existence of an established policy of the Board; second, that Con-

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[4] Senate Committee on Labor and Public Welfare, Hearings on S. 55 and S J Res. 22, 80th Congress, 1st Sess. Part 4, pp. 2343, 2344.

gress was aware of such policy before the present law (Labor Management Relations Act) was enacted and, third, that Congress refused to direct a change in such policy.

The action of Congress in rejecting the proposed amendment to compel the Board to take jurisdiction coincides with the statement subsequently made by Senator Taft in answer to a question from Senator Pepper.[5] The Board could hardly have had a clearer guide nor a firmer expression of approval for its established policy.

The attempt to have the Act amended in 1947 to compel the Board to take jurisdiction of hotel cases having failed, the petitioner Hotel & Restaurant Employees and Bartenders International Union reversed its policy. In 1951 in *Hotel Association of St. Louis* it specifically urged the Board not to take jurisdiction of hotel cases generally. The official record of the argument before the Board in that case[6] sets forth a strong plea on behalf of that petitioner urging the Board not to take jurisdiction. Among the statements

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[5] ". . . The Taft-Hartley Law did not change in any way the language providing for the jurisdiction of the Board, or the general definition of interstate commerce . . . It was not my intention in 1947, nor do I believe it was the intention of other members of the Committee on Labor and Public Welfare, to broaden or extend the jurisdiction of the Board in that respect. In fact, I feel very strongly that it should not be done . . . A hotel performs its service within four walls. It ships nothing into commerce. It produces no goods for commerce. In my opinion the Act was never intended to cover the hotel industry . . ." [Congressional Record 81st Cong., 1st Sess., pp. 12697 and 12698; also quoted in decision of Board in *Hotel Association of St. Louis*, 92 N. L. R. B. 1388 and in the Opinion of the District Court in the present proceeding, 147 F. Supp. 306].

[6] *Hotel Association of St. Louis*, 92 N. L. R. B. 1388 (1951), Case 14-RC-899, Official Report of Proceedings pp. 57, 60.

made in the argument by petitioner's counsel were the following:

> "Here is the largest union that is concerned in this industry, and it says to you, 'we don't want you to take jurisdiction. There is no need.' "[7]

On the question of the "long established" policy of the Board, the petitioners' argument included the following:

> "But getting back to the question of policy of the Board over the years, in the White Sulphur Springs Company case, where the Board enunciated what was a well established policy of not taking jurisdiction in hotels, you pointed out there that the policy was at that time fourteen years old and that there has not been any complaint about it. That is true."[8]

On the question of Congressional knowledge of the policy, the petitioner made the following statement:

> "The Congress passed the Taft-Hartley Act with full knowledge of the experience of the Board and attitude of the Board and did not change it. So you accepted that as the adopted policy of the nation."[9]

In 1949 the Board itself had made specific reference to its policy as being long-standing and in accordance with its interpretation of Congressional intent in *White Sulphur Springs Company*, 85 N. L. R. B. 1487 (1949) and did so again in *Hotel Association of St. Louis.*

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[7] *Hotel Association of St. Louis*, 92 N. L. R. B. 1388 (1951), Case 14-RC-899, Official Report of Proceedings p. 60.

[8] id. at p. 57.

[9] ibid.

During the period of almost ten years since the *White Sulphur Springs* decision, Congress has made no change in the Act to compel the Board to take jurisdiction in any case. A bill to do so, introduced by Senator Lehman (S. 2651, 84th Congress) on July 27, 1955, was not even reported by committee.

It seems clear that Congress has been satisfied since 1935 with the Board's policy of exercising its discretion to decline jurisdiction at least in hotel cases although fully informed of such policy.

Some confusion may be created by the citations of hotel cases arising in the District of Columbia and the Virgin Islands. Under the different language of the Act conferring jurisdiction, the Board asserted jurisdiction in a small number of hotel cases arising in the District of Columbia. Within the scope of its discretion to accept or decline jurisdiction, the Board's action in taking this jurisdiction in this limited group of cases was appropriate. However, the Board is not required by law to adhere to any fixed policy in matters in which it believes that Congress has conferred discretion. Changed conditions may warrant changes in such policy unless such change would violate the intent of Congress. The policies and standards must necessarily be subject to change. Such a change of policy is evidenced in *Virgin Isles Hotel Inc.*, 110 N. L. R. B. 558, (1954) and the reasons for such change are fully set forth in the Board's decision in that case.

As evidence that the Board did assert jurisdiction of hotels in the United States outside of the District of Columbia, reference has been made below to the

Vanderbilt Hotel case[10] and the inference is made that the Board asserted jurisdiction in that hotel case. This is incorrect as the record of the proceeding before the Board in that case will disclose. The Board there refused to approve the stipulation of settlement upon the ground that it would not take jurisdiction of hotel cases generally under its established policy. Its policy was not only established but consistent.

It is interesting to point out that the policy of the Board not to take jurisdiction of hotel cases generally was not an arbitrary and inflexible one, followed blindly and without exception if the facts warranted otherwise. In the present proceeding, the Board allowed a full hearing with oral argument before declining to assert jurisdiction and nothing was developed at that argument to take the case out of the general pattern of the hotel industry. As an example of the Board's willingness to make an exception if circumstances require it, we cite *Phillips Petroleum Company* v. *N. L. R. B.*, 206 Fed. (2d) 26 (1953). In the *Phillips* case the employer urged the Board to decline jurisdiction in a case involving hotel employees. The Board asserted jurisdiction, notwithstanding, on the ground that these hotel employees belonged in a unit with other employees of the company whose activities clearly had a substantial effect upon commerce. Absent any showing of such special facts at the hearing in this case the Board was justified in following its general practice in hotel cases, a practice which it believed had Congressional approval.

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[10] Case 10-CA-577 (1949).

3. The National Labor Relations Board has Discretionary Authority Under Section 9(c) of the Act to Refuse to Assert Jurisdiction in Representation Proceedings

The discretionary power of the Board to assert less than the full measure of its jurisdiction in the interest of better effectuating the policies of the Act has received the sanction of this Court. *National Labor Relations Board* v. *Denver Building & Construction Trades Council, supra.* This discretionary power was given because the Board, due to the great volume of business, has never been able to assume the full extent of its jurisdiction. Also, as recognized by District Judge Morris in his opinion below, it has been established that Congress intended to lodge in the Board rather than in the Courts the power to determine what employer-employee relationships so affect interstate commerce as to require the exercise of the powers granted to the Board. *National Labor Relations Board* v. *Stoller,* 207 Fed. (2d) 305, 307 (1953), cert. den. 347 U. S. 919; *Optical Workers Union* v. *National Labor Relations Board,* 227 Fed. (2d) 687, 691 (1955), rehearing denied, 229 F. 2d 170, certiorari denied, 351 U. S. 963.

The Board takes the position that a hotel employer may be engaged in activity affecting commerce within the meaning of the Act. *Hotel Association of St. Louis,* 92 N. L. R. B. 1388 (1951). Nevertheless, in the exercise of its discretion, the Board has refused to take jurisdiction over cases involving the hotel industry generally on the ground that the activities of the industry are essentially local in nature and have relatively little impact on interstate commerce and in the belief that this policy has the approval of Congress. Thus, in the *Virgin Isles Hotel* case, *supra,* a case

which arose in a territory of the United States over which Section 2 (6) gives the Board plenary powers, the Board refused to assert jurisdiction in a case involving a hotel, stating:

> "While it is true that the operations of this employer are not wholly unrelated to commerce, the relationship to commerce is no greater here than in the case of a hotel operating in any of the forty-eight states and we do not believe that the impact on commerce is sufficient in either instance to warrant the assertion of jurisdiction."

Despite this judicial approval of the policy, petitioners contend that with respect to representation proceedings brought under Section 9 (c), such discretion does not exist. In support of this contention, petitioners point out that under Section 10 (a) the Board is "empowered" to prevent unfair labor practices, but that such permissive language is not found in Section 9 (c) which states that upon the filing of a representation petition:

> "The Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists, shall provide for an appropriate hearing upon due notice."

The petitioners also note that the above-quoted language represents a change in the language of Section 9 (c) of the original act, which provided:

> "Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy * * *."

Petitioners urge that this change in verbs indicates the Congressional intent to give the Board no choice but to exert the full measure of its jurisdiction in representation proceedings.

It is submitted that petitioners' suggested interpretation of Section 9 (c) is without support in the legislative history of this section, and that the pertinent references indicate that the language of Section 9 (c) was amended for another purpose and the discretionary power of the Board with respect to representation proceedings was left untouched. To this effect is Senate Report No. 105, 80th Cong., 1st Sess., 1947, which shows the reasons for and the intended effect of the change on page 10, as follows:

> "Despite the absence of discriminatory language in the act, the Board refuses to entertain petitions filed by employees who wish to demonstrate that the current or asserted bargaining representative is not the choice of the majority. * * * This of course puts a premium upon raiding and jurisdictional rivalries. The committee bill would make it necessary for the Board to entertain petitions from employees irrespective of the type of relief sought. It does not change the Board's rules of decision with respect to requirements of substantiability in order to obtain a hearing * * *."

Thus it is clear that the existence of discretionary power with respect to representation proceedings is supported by Congress as well as the Courts. To hold in the manner suggested by the petitioners would involve the Board in countless cases of small import which would, in turn, defeat the basic policy of the Act which Congress declared in Section 1 to be the elimination of "the causes of certain substantial obstructions to the free flow of Congress * * *." It is also interesting to point out that, although not required to do so, in this case the Board permitted oral argument of the matter before the entire Board so that it cannot be

claimed that the petition was dismissed casually or offhand. Its action was certainly not capricious or arbitrary.

Conclusion

The action of the National Labor Relations Board in declining to assert jurisdiction in this case and dismissing the representation petition filed by the petitioners was within the authority given to the Board by Congress and for that reason the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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